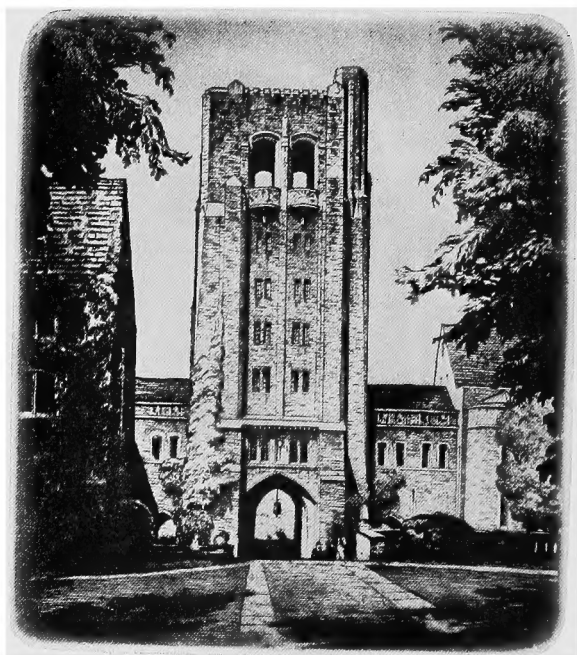




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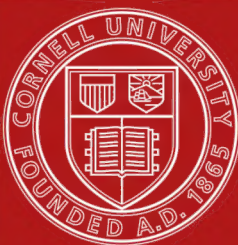
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COMMENTARIES
ON
EQUITY JURISPRUDENCE

BY
HON. MR. JUSTICE STORY, LL.D.
*Sometime one of the Justices of the Supreme Court
of the United States.*

THIRD ENGLISH EDITION.

BY
A. E. RANDALL
of Lincoln's Inn, Barrister-at-Law.

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PREFACE TO THE THIRD ENGLISH EDITION.

My main difficulty in preparing this edition was how to deal with the author's text. It is a recognised classic, and many passages have been adopted judicially. At the same time there are many statements which have been allowed to stand in previous editions, and which could not be supported at the present day. To allow the original text to remain unmodified would clearly mislead the student without assisting the practitioner.

Let me give one or two examples. Founding himself upon a dictum of Lord Hardwicke, the author asserted that "common sailors" in the mercantile and naval service required guardianship during the whole course of their lives, and received special consideration in courts of equity in relation to their bargains. But people in humble positions have shown the astuteness of the plaintiff in *Armory v. Delamirie* (1722) 1 Stra. 504. Again *Jenkins v. Kemis* as reported in 1 Ch. Cas. 103 could never have survived the destructive criticism of Lord St. Leonard's assuming that it was law in the author's day. See *Marnell v. Blake* (1816) 4 Dow. 248; 16 R.R. 36. So too, the accountability of one co-owner to another (be they joint tenants or tenants in common) does not rest on a fiduciary relationship, and the doctrine that joint debts are joint and several in equity was finally exploded about forty years ago.

I have frequently had occasion to comment on the practice which has persisted of supplementing the text by footnotes. Some editors have even deemed footnotes to be the proper medium for correcting inaccuracies in the text. To paraphrase a passage from a judgment in the text and set out the passage at large in a footnote, is a method of treatment which calls for special justification, but to cite identical passages from a judgment both in the text and in a footnote, as happened

in the preceding edition, is inexcusable. I have been able to reduce the bulk of this edition over that immediately preceding by omitting what was redundant or unnecessary. I have at the same time incorporated much that formerly appeared in footnotes. In a few instances I have allowed long footnotes to stand, but not without misgivings as to the wisdom of that course of treatment.

The text passed out of my hands before the full report of *Bourne v. Keane* appeared. The learned reader is requested to note that it is now reported [1919] A.C. 815.

A. E. RANDALL.

LINCOLN'S INN,
December, 1919.

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COMMENTARIES

ON

EQUITY JURISPRUDENCE.

CHAPTER I.

THE TRUE NATURE AND CHARACTER OF EQUITY JURISPRUDENCE.

§ 1. IN treating of the subject of equity, it is material to distinguish the various senses in which that word is used. For it cannot be disguised, that an imperfect notion of what, in England, constitutes equity jurisprudence, is not only common among those who are not bred to the profession, but that it has often led to mistakes and confusion in professional treatises on the subject. In the most general sense, we are accustomed to call that equity, which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex æquo et bono*. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian in the Pandects. “*Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Jus pluribus modis dicitur. Uno modo, cum id quod semper æquum et bonum, jus dicitur; ut est jus naturale. Juris præcepta sunt hæc; honeste vivere, alterum non lædere, suum cuique tribuere*” (a). And the word *jus* is used in the same sense in the Roman law, when it is declared, that *jus est ars boni et æqui* (b), where it means, what we are accustomed to call, jurisprudence (c).

§ 2. Now, it would be a great mistake to suppose that equity, as administered in England, embraced a jurisdiction so wide and exten-

(a) Dig. Lib. 1, tit. 1, ff 10, 11.

(b) Dig. Lib. 1, tit. 1, f. 1.

(c) Grotius, after referring to the Greek word, used to signify equity, says, “*Latinis autem æqui prudentia vertitur, quæ se ita ad æquitatem habet, ut jurisprudentia ad justitiam.*” Grotius de *Æquitate*, ch. 1, § 4. This distinction is more refined than solid, as the citation in the text shows. See also Taylor’s *Elements of the Civil Law*, pp. 90 to 98. Cicero, *Topic.* § 2; II. ad *Heren.* 13; III. ad *Heren.* 2. Bracton has referred to the various senses in which *jus* is used. Item (says he) *jus quandoque ponitur pro jure naturali, quod semper bonum et æquum est; quandoque pro jure civili tantum; quandoque pro jure prætorio tantum; quandoque pro eo*

sive, as that which arises from the principles of natural justice above stated. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman law, which has been justly thought to deal to a vast extent in matters *ex æquo et bono*, never affected so bold a design (*d*). On the contrary, it left many matters of natural justice wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness, or even to positive engagements of parties, where they are not founded in what constitutes a meritorious consideration. Thus, it is well known that in the Roman law, as well as in the common law, there are many pacts, or promises of parties (*nude pacts*), which produce no legal obligation, capable of enforcement *in foro externo*; but which are left to be disposed of *in foro conscientię only* (*e*). “Cum nulla subest causa propter conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit” (*f*). And again: “Qui autem promisit sine causa, condicere quantitatem non potest, quam non debet, sed ipsam obligationem” (*g*). And hence the settled distinction, in that law, between natural obligations, upon which no action lay, but which were merely binding in conscience, and civil obligations, which gave origin to actions (*h*). The latter were sometimes called just, because of their perfect obligation in a civil sense; the former merely equitable, because of their imperfect obligation. “Et justum appellatur” (says Wolfius) “quicquid fit secundum jus perfectum alterius; æquum vero quod secundum imperfectum” (*i*). Cicero has alluded to the double sense of the word *equity* in this very connection. “Æquitatis” (says he) “autem vis est duplex; cujus altera directi, et veri, et justı, ut dicitur, æqui et boni ratione defenditur; altera ad vicissitudinem referendę gratię pertinet; quod in beneficio gratia, in injuria ultio nominatur” (*k*). It is scarcely necessary to add, that it is not in this latter sense, any more than in the broad and general sense above stated, which Ayliffe has, with great propriety, denominated *Natural Equity*, because it depends on and is supported by natural reason, that equity is spoken of as a branch of English jurisprudence. The

tantum, quod competit ex sententiâ. Bracton, Lib. 1, ch. 4, p. 3. See Dr. Taylor's definition of *lex* and *jus*. Elem. Civ. Law, pp. 147, 148; *ibid.* pp. 40 to 43, 55, 56, 91 and 178.

(*d*) See Heinecc. Hist. Edit. L. 1, ch. 6; De Edictis Prætorum, § 7, 8, 9, 10, 11, 12; *ibid.* § 18, 21 to 30.

(*e*) Ayliffe, Pand. B. 4, tit. 2, pp. 424, 425; 1 Domat, Civ. Law, B. 1, tit. 1, § 5, art. 1, 6, 9, 13.

(*f*) Dig. Lib. 2, tit. 14, f. 7, § 4.

(*g*) Dig. Lib. 12, tit. 7, f. 1.

(*h*) Ayliffe, Pand. B. 4, tit. 1, pp. 420, 421.

(*i*) Wolff. Instit. Jur. Nat. et Gent. P. 1, ch. 3, § 83.

(*k*) Cic. Orat. Part. § 37.

latter falls appropriately under the head of *Civil Equity*, as defined by the same author, being deduced from and governed by such civil maxims as are adopted by any particular State or community (l).

§ 3. But there is a more limited sense in which the term is often used, and which has the sanction of jurists in ancient, as well as in modern times, and belongs to the language of common life, as well as to that of juridical discussions. The sense, here alluded to, is that in which it is used in contradistinction to strict law, or *strictum et summum jus*. Thus, Aristotle has defined the very nature of equity to be the correction of the law, wherein it is defective by reason of its universality (m). The same sense is repeatedly recognised in the Pandects. "In omnibus quidem, maxime tamen in jure, æquitas spectanda sit. Quotiens æquitas, desiderii naturalis ratio, aut dubitatio juris moratur, justis decretis res temperanda est. Placuit in omnibus rebus præcipuam esse justitiæ æquitatisque, quam stricti juris rationem" (n). Grotius and Puffendorf have both adopted the definition of Aristotle; and it has found its way, with approbation, into the treatises of most of the modern authors, who have discussed the subject (o).

§ 4. In the Roman jurisprudence we may see many traces of this doctrine, applied to the purpose of supplying the defects of the customary law, as well as to correct and measure the interpretation of the written and positive code. Domat accordingly lays it down, as a general principle of the civil law, that if any case should happen,

(l) Ayliffe, Pand. B. 1, tit. 7, p. 37.

(m) Arist. Ethic. Nicom. L. 5, ch. 14, cited 1 Wooddes. Lect. vii. p. 193; Taylor, Elem. of Civ. Law, pp. 91, 92, 93; Francis, Maxims, 3; 1 Fonbl. Eq. B. 1, § 2, p. 5, note (e). Cicero, speaking of Galba, says, that he was accustomed, "Multa pro æquitate contra jus dicere." Cic. de Oratore, Lib. 1, § 57. See also other passages cited in Taylor's Elem. of the Civ. Law, 90, 91. Bracton defines *equity*, as contradistinguished from law (*jus*), thus: "Æquitas autem est rerum convenientia, quæ in paribus causis paria desiderat jura, et omnia bene cœquiparat; et dicitur æquitas, quasi æqualitas." Bracton, Lib. 1, ch. 4, § 5, p. 3.

(n) Dig. Lib. 50, tit. 17, ff. 85, 90; Cod. Lib. 3, tit. 1, f. 8.

(o) Grotius de Æquitate, ch. 1, § 3; Puffend. Law of Nature and Nat. B. 5, ch. 12, § 21, and Barbeyrac's note (1); 1 Black. Comm. 61; 1 Wooddes. Lect. vii. p. 193; Bac. de Aug. Scient. Lib. 8, ch. 3. Aphor. 32, 34, 45. Grotius says: "Proprie vero et singulariter æquitas est virtus voluntatis, correctrix ejus, quo lex propter universalitatem deficit." Grotius de Æquitate, ch. 1, § 2. "Æquum est id ipsum, quo lex corrigitur." Ibid. Dr. Taylor has with great force paraphrased the language of Aristotle. That part of unwritten law, says he, which is called *Equity*, or τὸ Ἐπιεικὲς, is a species of justice distinct from what is written. It must happen either against the design and inclination of the law-giver, or with his consent. In the former case, for instance, when several particular facts must escape his knowledge; in the other, when he may be apprised of them, indeed, but by reason of their variety is not willing to recite them. For, if a case admits of an infinite variety of circumstances, and a law must be made, that law must be conceived in general terms. Taylor, Elem. Civ. Law, 92. And of this infirmity in all laws, the Pandects give open testimony. "Non possunt omnes articuli singulatim aut legibus, aut senatus consultis comprehendi; sed cum in aliqua causa sententia eorum manifesta est, is qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet." Dig. L. 1, tit. 3, ff. 10, 12.

which is not regulated by some express or written law, it should have for a law the natural principles of equity, which is the universal law, extending to every thing (*p*). And for this he founds himself upon certain texts in the Pandects, which present the formulary in a very imposing generality. "*Hæc æquitas suggerit, etsi jure deficiamus*," is the reason given for allowing one person to restore a bank or dam in the lands of another, which may be useful to him, and not injurious to the other (*q*).

§ 5. The jurisdiction of the Prætor doubtless had its origin in this application of equity, as contradistinguished from mere law. "*Jus autem civile*" (say the Pandects) "*est, quod ex legibus, plebiscitis, senatus consultis, decretis principum, auctoritate prudentium venit. Jus prætorium est, quod Prætores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis gratiâ, propter utilitatem publicam; quod et honorarium dicitur, ad honorem prætorum sic nominatum*" (*r*). But, broad and general as this language is, we should be greatly deceived if it were to be supposed that even the Prætor's power extended to the direct overthrow or disregard of the positive law. He was bound to stand by that law in all cases to which it was justly applicable, according to the maxim of the Pandects, "*Quod quidem perquam durum est; sed ita lex scripta est*" (*s*).

(*p*) Domat, Prel. Book, tit. 1, § 1, art. 23 See also Ayliffe, Pand. B. 1, tit. 7, p. 38.

(*q*) Dig. Lib. 39, tit. 3, f. 2, § 5. Domat cites other texts not perhaps quite so stringent; such as Dig. Lib. 27, tit. 1, f. 13, § 7; *ibid.* Lib. 47, tit. 20, f. 7. Dr. Taylor has given many texts to the same purpose. Elem. Civ. Law, pp. 90, 91. There was a known distinction in the Roman law on this subject. When a right was founded in the express words of the law, the actions grounded on it were denominated *Actiones Directæ*; where they arose upon a benignant extension of the words of the law to other cases, not within the terms, but within what we should call the equity of the law, they were denominated *Actiones Utiles*. Taylor, Elem. Civ. Law, 93.

(*r*) Dig. Lib. 1, tit. 1, f. 7. "*Sed et eas actiones, quæ legibus proditæ sunt* (say the Pandects) *si lex justa ac necessaria sit, supplet Prætor in eo, quod legi deest.*" Dig. Lib. 19, tit. 5, f. 11. Heineccius, speaking of the Prætor's authority, says: *His Edictis multa innovata, adjuvandi, supplendi, corrigendi juris civilis gratiâ, obtentuque utilitatis publicæ.* 1 Heinecc. Elem. Pand. P. 1, Lib. 1, § 42.

(*s*) Dig. Lib. 40, tit. 9, f. 12, § 1. See also 3 Black. Comm. 430, 431; 1 Wooddes. Lect. vii. pp. 192 to 200. Dr. Taylor (Elem. Civ. Law, p. 214) has therefore observed that, for this reason, this branch of the Roman law was not reckoned as part of the *jus civile scriptum* by Papinian, but stands in opposition to it. And thus, as we distinguish between common law and equity, there were with that people *actiones civiles et prætoriæ, et obligationes civiles, et prætoriæ*. The Prætor was therefore called *Custos, non conditor juris; judicia exercere potuit; jus facere non potuit; dicendi, non condendi juris potestatem habuit; juvare, supplere, interpretari, mitigare jus civile potuit; mutare vel tollere non potest.* The prætorian edicts are not properly law, though they may operate like law. And Cicero, speaking of contracts *bonæ fidei*, says, in allusion to the same jurisdiction. In his *magni esse judicis statuere* (præsertim cum in plerisque essent judicia contraria), *quid quemque cuique præstare oporteret*; that is, he should decide according to equity and conscience. Cic. de Officiis, Lib. 3, cap. 17. Dr. Taylor has, in another part of his work, gone at large into equity and its various meanings in the civil law. Taylor, Elem. Civ. Law, pp. 90 to 98.

§ 6. But a more general way in which this sense of equity, as contradistinguished from mere law, or *strictum jus*, is applied, is to the interpretation and limitation of the words of positive or written laws: by construing them, not according to the letter, but according to the reason and spirit of them (*t*). Mr. Justice Blackstone has alluded to this sense in his Commentaries, where he says: "From this method of interpreting laws by the reason of them arises what we call equity" (*u*); and more fully in another place, where he says: "Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this, equity is synonymous with justice; in that, to the true and sound interpretation of the rule" (*x*).

§ 7. In this sense equity must have a place in every rational system of jurisprudence, if not in name, at least in substance (*y*). It is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them. "*Neque leges neque senatus consulta ita scribi possunt*" (says the Digest) "*ut omnes casus, qui quandoque inciderint, comprehendantur; sed sufficit ea, quæ plerumque accideunt contineri*" (*z*). Every system of laws must necessarily be defective; and cases must occur, to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all. It is the office, therefore, of a judge to consider whether the antecedent rule does apply, or ought, according to the intention of the law-giver, to apply to a given case; and if there are two rules, nearly approaching to it, but of opposite tendency, which of them ought to govern it; and if there exists no rule applicable to all the circumstances, whether the party should be remediless, or whether the rule furnishing the closest analogy ought to be followed. The general words of a law may embrace all cases; and yet it may be clear, that all could not have been intentionally embraced; for if they were, the obvious objects of the legislation might or would be defeated. So, words of a doubtful

(*t*) Plowden, Comm. pp. 465, 466.

(*u*) 1 Black. Comm. pp. 61, 62.

(*x*) 3 Black. Comm. p. 429. See also Taylor, Elem. Civ. Law, pp. 96, 97; Plowd. Comm. p. 465, Reporter's note. Dr. Taylor has observed that the great difficulty is, to distinguish between that equity, which is required in all law whatsoever, and which makes a very important and a very necessary branch of the *jus scriptum*; and that equity, which is opposed to written and positive law, and stands in contradistinction to it. Taylor, Elem. Civ. Law, p. 90.

(*y*) See 1 Fonbl. Equity, B. 1, § 3, p. 24, note (*h*); Plowden, Comm. pp. 465, 466. Lord Bacon said in his Argument on the jurisdiction of the Marches, there is no law under heaven which is not supplied with equity; for *summum jus summa injuria*; or as some have it, *summa lex summa crux*. And, therefore, all nations have equity. 4 Bac. Works, p. 274. Plowden, in his note to his Reports, dwells much (pp. 465, 466) on the nature of equity in the interpretation of statutes, saying, "*Ratio legis est anima legis*." And it is a common maxim in the law of England, that "*Apices juris non sunt jura*." Branch's Maxims, p. 12; Co. Litt. 304 (*b*).

(*z*) Dig. Lib. 1, tit. 3, f. 10.

import may be used in a law, or words susceptible of a more enlarged, or of a more restricted meaning, or of two meanings equally appropriate (a). The question, in all such cases, must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the legislature, and to give such a construction to the words, as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of equity, as contradistinguished from a strict adherence to the mere letter of the law. Hence arises a variety of rules in interpretation of laws, according to their nature and operation, whether they are remedial, or are penal laws; whether they are restrictive of general right, or in advancement of public justice or policy; whether they are of universal application, or of a private and circumscribed intent. But this is not the place to consider the nature or application of those rules (b).

§ 8. It is of this equity, as correcting, mitigating, or interpreting the law, that, not only civilians, but common-law writers, are most accustomed to speak (c); and thus many persons are misled into the

(a) It is very easy to see from what sources Mr. Charles Butler drew his own statement (manifestly, as a description of English equity jurisprudence, incorrect, as Professor Park has shown), "that equity, as distinguished from law, arises from the inability of human foresight to establish any rule, which, however salutary in general, is not in some particular cases, evidently unjust and oppressive, and operates beyond or in opposition to its intent, &c. The grand reason for the interference of a court of equity is, that the imperfection of the legal remedy, in consequence of the universality of legislative provisions, may be redressed." 1 Butler's *Reminisc.* 37, 38, 39; Park's *Introductio* Lect. 5, 6. Now, Aristotle, or Cicero, or a Roman *Prætor*, or a Continental Jurist, or a Publicist of modern Europe might have used these expressions, as a description of general equity; but it would have given no just idea of equity, as administered under the municipal jurisprudence of England.

(b) See Grotius *de Jure Belli ac Pacis*, Lib. 3, ch. 20, § 47, pp. 1, 2; Grotius *de Æquitate*, ch. 1. This paragraph is copied very closely from the article *Equity*, in Dr. Lieber's *Encyclopædia Americana*, a licence which has not appropriated another person's labours. There will be found many excellent rules of interpretation of Laws in Rutherford's *Institutes of Natural Law*, B. 2, ch. 7; in Bacon's *Abridgment*, title *Statute*; in Domat on the *Civil Law* (*Prelim. Book*, tit. 1, § 2); and in 1 Black. *Comm.* Introduction, pp. 58 to 62.

There are yet other senses, in which equity is used, which might be brought before the reader. The various senses are elaborately collected by Oldendorpius, in his work *De Jure et Æquitate Disputatio*; and he finally offers, what he deems a very exact definition of equity in its general sense. "Æquitas est judicium animi, ex vera ratione petitur, de circumstantiis rerum, ad honestatem vitæ pertinentium, cum incidunt, recte discernens, quid fieri aut non fieri oporteat." This seems but another name for a system of ethics. Grotius has in one short paragraph (*De Æquitate*, ch. 1, § 2) brought together the different senses in a clear and exact manner. "Et ut de æquitate primum loquamur, scire oportet, æquitatem aut æquum de omni interdum jure dici, ut cum jurisprudentia ars boni et æqui dicitur; interdum de jure naturali absolute, ut cum Cicero ait, jus legibus, moribus. et æquitate constare; alias vero de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit. Sæpe etiam de jure aliquo civili proprius ad jus naturale accedente, idque respectu alterius juris, quod paulo longius recedere videtur, ut jus *Prætorium* et quædam jurisprudentiæ interpretationes. Proprie vero et singulariter æquitas est virtus voluntatis, correctrix ejus, in quo lex propter universalitatem deficit."

(c) Merlin, *Répertoire Équité*. Grounds and Rudim. of the Law (attributed

false notion, that this is the real and peculiar duty of courts of equity. St. Germain, after alluding to the general subject of equity, says: "In some cases it is necessary to leave the words of the law, and to follow that reason and justice requireth, and to that intent equity is ordained, that is to say, to temper and mitigate the rigour of the law, &c. And so it appeareth, that equity taketh not away the very right, but only that that seemeth not to be right, by the general words of the law" (*d*). And then he goes on to suggest the other kind of equity, as administered in chancery, to ascertain "whether the plaintiff hath title in conscience to recover or not" (*e*). And, in another place, he states: "Equity is a rightwiseness, that considereth all the particular circumstances of the deed, which is also tempered with the sweetness of mercy" (*f*). Another learned author lays down doctrines equally broad. "As *summum jus*" (says he) "*summa est injuria*, as it cannot consider circumstances; and as this [equity] takes in all the circumstances of the case, and judges of the whole matter according to good conscience, this shows both the use and excellence of equity above any prescribed law." Again: "Equity is that which is commonly called equal, just, and good; and is a mitigation or moderation of the common law, in some circumstances, either of the matter, person, or time; and often it dispenseth with the law itself" (*g*). "The matters, of which equity holdeth cognizance in its absolute power, are such as are not remediable at law; and of them the sorts may be said to be as infinite, almost, as the different affairs conversant in human life" (*h*). And, he adds, that "equity is so extensive and various, that every particular case in equity may be truly said to stand upon its own particular circumstances; and, therefore, under favour. I apprehend precedents not of that great use in equity, as some would contend; but that equity thereby may possibly be made too much a science for good conscience" (*i*).

§ 9. This description of equity differs in nothing essential from that given by Grotius and Puffendorf (*k*), as a definition of general equity, as contradistinguished from the equity which is recognised by the mere municipal code of a particular nation. And, indeed, it goes

sometimes to Francis), pp. 3, 5, edit. 1751; 1 Fonbl. Equity, B. 1, ch. 1, § 2, note (*e*); 1 Wooddes. Lect. vii. pp. 192 to 200; Pothier, Pand. Lib. 1, tit. 3, art. 4, § 11 to 27.

(*d*) Dialogue 1, ch. 16.

(*e*) Ibid. 1, ch. 17.

(*f*) Ibid. ch. 16.

(*g*) Grounds and Rudim. pp. 5, 6, edit. 1751.

(*h*) Grounds and Rudim. p. 6, edit. 1751.

(*i*) Grounds and Rudim. pp. 5, 6, edit. 1751. Yet Francis (or whoever else was the author) is compelled to admit, that there are many cases in which there is no relief to be had, either at law or in equity itself; but the same is left to the conscience of the party, as a greater inconvenience would thence follow to the people in general. Francis, Max. p. 5.

(*k*) Grotius de *Æquitate*, ch. 1, § 3, 12; Puffend. Elem. Juris. Univ. L. 1, § 22, 23, cited 1 Fonbl. Eq. B. 1, ch. 1, § 2, note (*e*), p. 6.

the full extent of embracing all things, which the law has not exactly defined, but leaves to the arbitrary description of a judge; or, in the language of Grotius, “*de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit*” (l). So that, in this view of the matter, an English court of equity would seem to be possessed of exactly the same prerogatives and powers as belonged to the Prætor’s forum in the Roman law (m).

§ 10. Nor is this description of the equity jurisprudence of England confined to a few text-writers. It pervades a large class, and possesses the sanction of many high authorities. Lord Bacon more than once hints at it. In his Aphorisms he lays it down, “*Habeant similiter Curia Prætoria potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis*” (n). And on the solemn occasion of accepting the office of Chancellor, he said: Chancery is ordained to supply the law, and not to subvert the law (o). Finch, in his Treatise on the Law, says, that the nature of equity is to amplify, enlarge, and add to the letter of the law (p). In the Treatise of Equity, attributed to Mr. Ballow, and deservedly held in high estimation, language exceedingly broad is held on this subject. After remarking, that there will be a necessity of having recourse to the natural principles, that what is wanting to the finite may be supplied out of that which is infinite; and that this is properly what is called equity, in opposition to strict law, he proceeds to state: “And thus in chancery, every particular case stands upon its own circumstances; and although the common law will not decree against the general rule of law, yet chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to say anything contrary to the law of nature; and indeed no man in his senses can be presumed willing to oblige another to it” (q).

§ 11. The author has, indeed, qualified these propositions with the suggestion: “But if the law has determined a matter with all its circumstances, equity cannot intermeddle.” But, even with this qualification, the propositions are not maintainable, in the equity

(l) Grotius de *Æquitate*, ch. 1. § 2; 1 Fonbl. Equity, B. 1, ch. 1, § 2, note (e).

(m) Dig. Lib. 1, f. 7. See also Heinecc. De Edict. Prætorum, Lib. 1, ch. 6, § 8 to 13; *ibid.* § 18 to 30; Dr. Taylor’s Elem. Civ. Law, 213 to 216; *ibid.* 92, 93; De Lolme on Eng. Const. B. 1, ch. 11. Lord Kaimes does not hesitate to say, that the powers assumed by our courts of equity are in effect the same that were assumed by the Roman Prætor from necessity, without any express authority. 1 Kaimes, Eq. Intro. 19.

(n) Bac. De Aug. Scient. Lib. 8, ch. 3, Aphor. 35, 45.

(o) Bac. Speech. 4; Bac. Works, 488.

(p) Finch’s Law, p. 20.

(q) 1 Fonbl. Eq. B. 1, ch. 1, § 3. The author of Eunomus describes the original jurisdiction of the Court of Chancery, as a court of equity, to be “the power of moderating the *summum jus*.” Eunomus, Dial. 3 § 60.

jurisprudence of England, in the general sense in which they are stated. For example, the first proposition, that equity will relieve against a general rule of law, is (as has been justly observed) neither sanctioned by principle nor by authority (*r*). For, though it may be true that equity has, in many cases, decided differently from courts of law, yet it will be found that these cases involved circumstances to which a court of law would not advert; but which, in point of substantial justice, were deserving of particular consideration; and which a court of equity, proceeding on principles of substantial justice, felt itself bound to respect (*s*).

§ 12. Mr. Justice Blackstone has taken considerable pains to refute this doctrine. "It is said" (he remarks) "that it is the business of a court of equity, in England, to abate the rigour of the common law (*t*). But no such power is contended for. Hard was the case of bond creditors, whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in a better condition than the heir; yet a court of equity had no power to interfere. Hard is the common law still subsisting, that land devised, or descending to the heir, should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son. But a court of equity can give no relief; though, in both these instances, the artificial reason of the law, arising from feudal principles, has long since ceased" (*u*). And although these remarks of Mr. Justice Blackstone have now lost their force owing to the Statute against Fraudulent Devises (3 Will. & Mary, c. 14, s. 2), which rendered the devisee equally with the heir liable to the bond debts of the deceased, and the 3 & 4 Will. 4 c. 104, which made the lands of a deceased debtor liable to his simple contract debts, yet from the very fact that legislation was necessary, it appears that it was not within the province of courts of equity to relieve the hardships complained of. And (not to multiply instances) what could be more harsh, or indefensible, than was the rule of the common law, by which a husband might receive an ample fortune in personal estate, through his wife, and by his own act, or will, strip her of every farthing, and leave her a beggar?

§ 13. A very learned judge in equity, in one of his ablest judgments, has put this matter in a very strong light (*x*). "The law is clear" (said he), "and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great

(*r*) Com. Dig. Chancery, 3 F. 8.

(*s*) 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*g*); 1 Dane's Abridg. ch. 9, art. 1, § 2, 8; *Kemp v. Pryor*, 7 Ves. 249, 250.

(*t*) Grounds and Rudim. p. 74 (Max. 105), edit. 1751.

(*u*) 3 Black. Comm. 430. See Com. Dig. Chancery, 3 F. 8.

(*x*) Sir Joseph Jekyll, in *Cowper v. Cowper*, 2 P. Wms. 753.

uncertainty and confusion would ensue. And, though proceedings in equity are said to be *secundum discretionem boni viri*; yet when it is asked "Vir bonus est quis?" the answer is "Qui consulta patrum, qui leges juraque servat." And, as it is said in *Rook's Case* (5 Rep. 99 b), that discretion is a science, not to act arbitrarily, according to men's wills, and private affections; so that discretion, which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it. But in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to the court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with" (y).

§ 14. The next proposition, that every matter that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief in equity, is equally untenable. There are many cases against natural justice, which are left wholly to the conscience of the party, and are without any redress, equitable or legal. And so far from a court of equity supplying universally the defects of positive legislation, or peculiarly carrying into effect the intent, as contradistinguished from the text of the legislature, it is governed by the same rules of interpretation as a court of law; and is often compelled to stop where the letter of the law stops. It is the duty of every court of justice, whether of law or of equity, to consult the intention of the legislature. And, in the discharge of this duty, a court of equity is not invested with a larger or a more liberal discretion than a court of law.

§ 15. Mr. Justice Blackstone has here again met the objection in a forcible manner. "It is said" (says he) "that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess to interpret statutes according to the true intent of the legislature. In general, all cases cannot be foreseen; or, if foreseen, cannot be expressed. Some will arise which will fall within the meaning, though not within the words of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an Act of Parliament; and so, cases within the letter, are frequently out of the equity. Here, by equity, we mean nothing but the

(y) Sir Thomas Clarke, in pronouncing his judgment in the case of *Burgess v. Wheate* (1 W. Black. 123), has adopted this very language, and given it his full approbation. See also *Fry v. Porter*, 1 Mod. 300; *Grounds and Rudim.* p. 65 (Max. 92), edit. 1751.

sound interpretation of the law. . . . But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity. The construction must in both be the same; or, if they differ, it is only as one court of law may happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question. Neither can enlarge, diminish, or alter that sense in a single title" (z).

§ 16. Yet it is by no means uncommon to represent that the peculiar duty of a court of equity is to supply the defects of the common law, and next, to correct its rigour or injustice (a). Lord Kaimes avows this doctrine in various places, and in language singularly bold. "It appears now clearly" (says he) "that a court of equity commences at the limits of the common law, and enforces benevolence, where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its general refinements, enforces every natural duty that is not provided for at common law" (b). And in another place he adds, a court of equity boldly undertakes "to correct or mitigate the rigour, and what, in a proper sense, may be termed the injustice of the common law" (c). And Mr. Wooddeson, without attempting to distinguish accurately between general or natural, and municipal or civil equity, asserts, that "equity is a judicial interpretation of laws, which, presupposing the legislator to have intended what is just and right, pursues and effectuates that intention" (d).

§ 17. The language of judges has often been relied on for the same purpose; and, from the unqualified manner in which it is laid down, too often justifies the conclusion. Thus, Sir John Trevor (the Master of the Rolls), in his able judgment in *Dudley v. Dudley* (e), says: "Now, equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is a universal truth. It does also assist the law, where it is defective and weak in the constitution (which is the life of the law), and defends the law from crafty evasions, delusions, and mere subtleties, invented and contrived to evade and elude the common law, whereby such as have undoubted right are made remediless. And thus is the office of equity to protect and support the common law from shifts and contrivances against the justice of the law.

(z) 3 Black. Comm. 431; 1 Dane, Abr. ch. 9, art. 3, § 3.

(a) 1 Kaimes on Equity, B. 1, p. 40.

(b) 1 Kaimes on Equity, Introd. p. 12.

(c) 1 Kaimes on Equity, Introd. p. 15. Lord Kaimes' remarks are entitled to the more consideration because they seem to have received, in some measure at least, the approbation of Lord Hardwicke (Parke's Hist. of Chan. Appx. 501, 502; *ibid.* 333, 334); and also from Mr. Justice Blackstone having thought them worthy of a formal refutation in his Commentaries. 3 Black. Comm. 436.

(d) 1 Wooddes. Lect. vii. p. 192.

(e) Prec. Ch. 241, 244; 1 Wooddes. Lect. vii. p. 192.

Equity, therefore, does not destroy the law, nor create it, but assists it." Now, however true this doctrine may be *sub modo*, to suppose it true in its full extent would be a grievous error.

§ 18. There is another suggestion, which has been often repeated; and that is, that courts of equity are not, and ought not, to be bound by precedents; and that precedents, therefore, are of little or no use there; but that every case is to be decided upon circumstances, according to the arbitration or discretion of the judge, acting according to his own notions, *ex æquo et bono* (f). Mr. Justice Blackstone, addressing himself to this erroneous statement, has truly said: "The system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. . . . Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule" (g). And he afterwards adds: "The systems of jurisprudence in our courts of law and equity are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings" (h). The value of precedents, and the importance of adhering to them, were deeply felt in ancient times, and nowhere more than in the Prætor's forum. "Consuetudinis autem jus esse putatur id" (says Cicero) "quod, voluntate omnium, sine lege, vetustas comprobarit. In ea autem jura sunt, quædam ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, quæ Prætores edicere con-

(f) See Francis, Max. pp. 5, 6; Selden, cited in 3 Black. Comm. 432, 433, 435; 1 Kaimes, Eq. pp. 19, 20.

(g) 3 Black Comm. 432, 433.

(h) 3 Black. 434; *ibid.* 440, 441; 1 Kent, Comm. Lect. 21, pp. 489, 490 (2nd edition). The value and importance of precedents in chancery were much insisted upon by Lord Keeper Bridgman, in *Fry v. Porter* (1 Mod. 300, 307). See also 1 Wooddes. Lect. vii. pp. 200, 201, 202. Lord Hardwicke, in his letter to Lord Kaimes, on the subject of equity, in answer to the question whether a court of equity ought to be governed by any general rules, said, "Some general rules there ought to be; for otherwise the great inconvenience of *jus vagum et incertum* will follow. And yet the Prætor must not be so absolutely and invariably bound by them, as the judges are by the rules of the common law. For if they were so bound, the consequence would follow, which you very judiciously state, that he must sometimes pronounce decrees which would be materially unjust; since no rule can be equally just in the application to a whole class of cases, that are far from being the same in every circumstance." (Parke's Hist. of Chancery, pp. 501, 506.) This is very loosely said; and the reason given equally applies to every general rule; for there can be none, which will be found equally just in its application to all cases. If every change of circumstances is to change the rule in equity, there can be no general rule. Every case must stand upon its own ground. Yet courts of equity now adhere as closely to general rules as courts of law. Each expounds its rules to meet new cases; but each is equally reluctant to depart from them upon slight inconveniences and mischiefs. See Mitford, Plead. in Eq. p. 4, note (b); 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (k). The late Professor Park, of King's College (London), has made some very acute remarks on this whole subject, in his Introductory Lecture on Equity (1832).

suerunt" (i). And the Pandects directly recognize the same doctrine. "Est enim juris civilis species *consuetudo*; enimvero, diuturna consuetudo pro jure et lege, in his, quæ non ex scripto descendunt observari, solet, &c. Maxime autem probatur consuetudo ex rebus judicatis" (k).

§ 19. If, indeed, a court of equity in England did possess the unbounded jurisdiction which has been thus generally ascribed to it, of correcting, controlling, moderating, and ever superseding the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway and the most formidable instrument of arbitrary power that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, *arbitro boni judicis*, and, it may be, *ex æquo et bono*, according to his own notions and conscience, but still acting with a despotic and sovereign authority. A court of chancery might then well deserve the spirited rebuke of Selden: "For law we have a measure, and know what to trust to. Equity is according to the conscience of him that is chancellor; and as that is larger, or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the chancellor's conscience" (l). And notions of this sort were, in former ages, when the chancery jurisdiction was opposed with vehement disapprobation by common lawyers, very industriously propagated by the most learned of English antiquarians, such as Spelman, Coke, Lambard, and Selden (m). We might, indeed, under such circumstances, adopt the language of Mr. Justice Blackstone, and say: "In short, if a court of equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case" (n). So far, however, is this from being true, that one of the most common maxims upon which a court of equity daily acts, is, that "equity follows the law, and seeks out and guides itself by the analogies of the law" (o).

(i) Cicero de Invent. Lib. 2, cap. 22. My attention was first called to these passages by a note of Lord Redesdale. Mitford, Plead. in Eq. p. 4, note (b). See Heineccius, De Edictis Prætorum, Lib. 1, cap. 6, § 13, 30.

(k) Pothier, Pand. Lib. 1, tit. 3, art. 6 n. 28, 29; Dig. Lib. 1, tit. 3, f. 33, f. 34.

(l) Selden's Table Talk, title *Equity*, cited 3 Black Comm. 432, note (y).

(m) See citations, 3 Black. Comm. 433; *ibid.* 54, 55, 440, 441.

(n) 3 Black. Comm. 433; *ibid.* 440, 441, 442. De Lolme, in his work on the Constitution of England, has presented a view of English equity jurisprudence, far more exact and comprehensive than many of the English text-writers on the same subject. The whole chapter (B. 1, c. 11) is well worthy of perusal.

(o) *Cowper v. Cowper*, 2 P. Wms. 753.

§ 20. What has been already said upon this subject cannot be more fitly concluded than in the words of one of the ablest judges that ever sat in equity. "There are" (said Lord Redesdale) "certain principles, on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain as the principles on which the courts of common law proceed" (*p*). In confirmation of these remarks it may be added, that the courts of common law are, in like manner, perpetually adding to the doctrines of the old jurisprudence; and enlarging, illustrating, and applying the maxims which were at first derived from very narrow and often obscure sources. For instance, the whole law of Insurance is scarcely a century old; and more than half of its most important principles and distinctions have been created within the last fifty years (*q*).

§ 21. In the early history of English equity jurisprudence, there might have been, and probably was, much to justify the suggestion, that courts of equity were bounded by no certain limits or rules; but they acted upon principles of conscience and natural justice, without much restraint of any sort. And as the chancellors were, for many ages, almost universally either ecclesiastics or statesmen, neither of whom are supposed to be very scrupulous in the exercise of power; and as they exercised a delegated authority from the Crown, as the fountain of administrative justice, whose rights, prerogatives, and duties on this subject were not well defined, and whose decrees were not capable of being resisted, it would not be unnatural that they should arrogate to themselves the general attributes of royalty, and interpose in many cases, which seemed to them to require a remedy, more wide or more summary than was adopted by the common courts of law.

§ 22. This is the view which Mr. Justice Blackstone seems to have taken of the matter; who has observed that, in the infancy of our courts of equity, before their jurisdiction was settled, the chancellors themselves, "partly from their ignorance of the law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority as hath totally been disclaimed by their successors, for now [1765] above a century past. The decrees of the court of equity were then rather in the

(*p*) *Bond v. Hopkins*, 1 Sch. & Lef. 428, 429.

(*q*) The original edition was published in 1835.

nature of awards, formed on the sudden, *pro re natá*, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, as precedents" (r).

§ 23. It was fortunate, indeed, that, even in those early times, the knowledge which the ecclesiastical chancellors had acquired of general equity and justice from the civil law, enabled them to administer them with a more sound discretion than could otherwise have been done. And from the moment, when principles of decision came to be acted upon and established in chancery, the Roman law furnished abundant principles to erect a superstructure, at once solid, convenient, and lofty, adapted to human wants, and enriched by all the aids of human wisdom, experience, and learning. To say that later chancellors have borrowed much from these materials, is to bestow the highest praise upon their judgment, their industry, and their reverential regard to their duty. It would have been little to the commendation of such learned minds, that they had studiously disregarded the maxims of ancient wisdom, or had neglected to use them, from ignorance, from pride, or from indifference (s).

§ 24. Having dwelt thus far upon the inaccurate, or inadequate notions, which are frequently circulated, as to equity jurisprudence, it may be thought proper to give some more exact and clear statement of it. This may be better done by explanatory observations, than by direct definitions, which are often said in the law to be perilous and unsatisfactory.

§ 25. In England, equity has a restrained and qualified meaning. The remedies for the redress of wrongs, and for the enforcement of rights, were distinguished into two classes: first, those which were administered in courts of common law; and secondly, those which were administered in courts of equity. Rights, which were recognized and protected, and wrongs, which were redressed by the former courts, were called legal rights and legal injuries. Rights which were recognized and protected, and wrongs, which were redressed by the latter courts only, were called equitable rights and equitable injuries. The former were said to be rights and wrongs at common law, and the remedies, therefore, were remedies at common law; the latter were said to be rights and wrongs in equity, and the remedies, therefore, were

(r) 3 Black Comm. 433; *ibid.* 440, 441.

(s) The whole of the late Professor Park's Lecture upon Equity Jurisprudence, delivered in King's College in Nov. 1831, on this subject, is well deserving of a perusal by every student. There is much freedom and force in his observations, and, if his life had been longer spared, he would probably have been a leader in a more masculine and extensive course of law studies by the English Bar. There are also two excellent articles on the same subject in the *American Jurist*, one of which, published in 1829, contains a most elaborate review and vindication of the jurisdiction of courts of equity, and the other in 1833, a forcible exposition of the prevalent errors on the subject (2 *Amer. Jurist*, 314; 10 *Amer. Jurist*, 227). I know not where to refer the reader to pages more full of useful comment and research.

remedies in equity. Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice, which was exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice, which was exclusively administered by a court of common law.

§ 26. The distinction between the former and the latter courts may be further illustrated by considering the different natures of the rights they were designed to recognize and protect, the different natures of the remedies which they applied, and the different natures of the forms and modes of proceeding which they adopted to accomplish their respective ends. In the courts of common law there were certain prescribed forms of action, to which the party must have resorted to furnish him a remedy; and, if there were no prescribed form to reach such a case, he was remediless; for they entertained jurisdiction only of certain actions, and gave relief according to the particular exigency of such actions, and not otherwise. In those actions, a general and unqualified judgment only could be given, for the plaintiff, or for the defendant, without any adaptation of it to particular circumstances.

§ 27. But there are many cases, in which a simple judgment for either party, without qualifications, or conditions, or peculiar arrangements, will not do entire justice *ex æquo et bono* to either party. Some modifications of the rights of both parties may be required; some restraints on one side, or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations, or duties; some compensatory, or preliminary, or concurrent proceedings to fix, control, or equalise rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries. In all these cases courts of common law could not give the desired relief. They had no forms of remedy adapted to the objects. They could entertain suits only in a prescribed form, and they could give a general judgment only in the prescribed form. From their very character and organisation they were incapable of the remedy, which the mutual rights and relative situations of the parties, under the circumstances, positively required.

§ 28. But courts of equity were not so restrained. Although they had prescribed forms of proceedings, the latter were flexible, and might be suited to the different postures of cases. They might adjust their decrees, so as to meet most, if not all, of these exigencies; and they might vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more: they could bring before them all parties interested in the subject-matter, and adjust the rights of all, however numerous; whereas, courts of common law were compelled to limit their inquiry to the very parties in the litigation before them, although other persons might have the deepest interest in the event of the suit. So that one of the most striking

and distinctive features of courts of equity was, that they could adapt their decrees to all the varieties of circumstances, which might arise, and adjust them to all the peculiar rights of all the parties in interest; whereas courts of common law (as we have already seen) were bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff, or for the defendant (*t*).

§ 29. Another peculiarity of courts of equity was, that they could administer remedies for rights, which rights, courts of common law did not recognize at all; or, if they did recognize them, they left them wholly to the conscience and good-will of the parties. Thus, what are technically called Trusts, that is, estates vested in persons upon particular trusts and confidences, were wholly without any cognizance at the common law; and the abuses of such trusts and confidences were beyond the reach of any legal process. But they are cognizable in courts of equity; and hence they are called equitable estates; and an ample remedy is there given in favour of the *cestuis que trust* (the parties beneficially interested) for all wrongs and injuries, whether arising from negligence, or positive misconduct (*u*). There are also many cases (as we shall presently see) of losses and injuries by mistake, accident, and fraud; many cases of penalties and forfeitures; many cases of impending irreparable injuries, or meditated mischiefs; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains, in all of which courts will interfere and grant redress; but which the common law took no notice of, or silently disregarded (*x*).

§ 30. Again: the remedies in courts of equity were often very different, in their nature, mode, and degree, from those of courts of common law, even when each had a jurisdiction over the same subject-matter. Thus, a court of equity, if a contract is broken, would often compel the party specifically to perform the contract; whereas, courts of law could only give damages for the breach of it. So, courts of equity would interfere by way of injunction to prevent wrongs; whereas, courts of common law could grant redress only, when the wrong was done.

§ 31. The modes of seeking and granting relief in equity were also different from those of courts of common law. The latter proceed to the trial of contested facts by means of a jury; and the evidence till lately was drawn, not from the parties, but from third persons who

(*t*) 1 Wooddes. Lect. vii. pp. 203 to 206; 3 Black. Comm. 438. Much of this paragraph has been abstracted from Dr. Lieber's *Encyclopedia Americana*, article *Equity*. The late Professor Park, of King's College, London, in his *Introductory Lecture on Equity* (1831, p. 15), has said, "The editors of the *Encyclopedia Americana* have stated the real case, with regard to what we call courts of equity, much more accurately than I can find it stated in any English Law Books"; and he thus admits the propriety of the exposition contained in the text.

(*u*) 3 Black. Comm. 439.

(*x*) *Ibid.* 434, 435, 438, 439.

were disinterested witnesses. But courts of equity tried causes without a jury; and they addressed themselves to the conscience of the defendant, and required him to answer upon his oath the matters of fact stated in the bill, if they were within his knowledge; and he was compellable to give a full account of all such facts, with all their circumstances, without evasion, or equivocation; and the testimony of other witnesses also might be taken to confirm, or to refute, the facts so alleged. Indeed, every bill in equity may be said to have been, in some sense, a bill of discovery, since it asked for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill. It may readily be perceived, how very important this process of discovery may be, when we consider how great the mass of human transactions is, in which there are no other witnesses, or persons, having knowledge thereof, except the parties themselves.

§ 32. Mr. Justice Blackstone has, in a few words, given an outline of some of the more important powers and peculiar duties of courts of equity. He says, that they are established "to detect latent frauds, and concealments, which the process of courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law" (y). But the general account of Lord Redesdale (which he admits, however, to be imperfect, and in some respects inaccurate), is far more satisfactory, as a definite enumeration. "The jurisdiction of a court of equity" (says he) (z), "when it assumes a power of decision, is to be exercised, (1) where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; (2) where the courts of ordinary jurisdiction are made instruments of injustice; (3) where the principles of law, by which the ordinary courts are guided, give no right, but upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. And it may also be collected, that courts of equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction; (4) to remove impediments to the fair decision of a question in other courts; (5) to provide for the safety of property in dispute, pending a litigation,

(y) 1 Black. Comm. 92.

(z) Mitford, Pl. Eq. by Jeremy, pp. 111, 112. See also *ibid.* pp. 4, 5. Dr. Dane, in his *Abridgment and Digest*, ch. 1, art. 7, § 33 to 51 (1 Dane, *Abrid.* 101 to 197), has given a summary of the differences between equity jurisdiction and legal jurisdiction in regard to contracts, which may be read with utility.

and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interest; (6) to restrain the assertion of doubtful rights in a manner productive of irreparable damage; (7) to prevent injury to a third person by the doubtful title of others; and (8) to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits. And further, that courts of equity, without pronouncing any judgment, which may affect the rights of parties, extend their jurisdiction; (9) to compel a discovery, or obtain evidence, which may assist the decision of other courts; and (10) to preserve testimony, when in danger of being lost, before the matter, to which it relates, can be made the subject of judicial investigation."

§ 33. Perhaps the most general, if not the most precise, description of a court of equity, is, that it had jurisdiction in cases of rights, recognised and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy could be not had in the courts of common law (*a*). The remedy must have been plain; for if it be doubtful and obscure at law, equity would assert a jurisdiction (*b*). It must have been adequate; for, if at law it fell short of what the party was entitled to, that founded a jurisdiction in equity (*c*). And it must have been complete; that is, it must have attained the full end and justice of the case. It must have reached the whole mischief, and secured the whole right of the party in a perfect manner, at the present time, and in future; otherwise, equity would interfere and give such relief and aid as the exigency of the particular case might require (*d*). The jurisdic-

(*a*) Cooper, Eq. Pl. 128, 139; Mitford, Pl. Eq. by Jeremy, 112, 123.

(*b*) *Southampton Dock Co. v. Southampton Board*, L. R. 11 Eq. 254.

(*c*) In the early days of English jurisprudence, subjects could sue each other in the county and hundred courts only. The King's Bench, Common Pleas, and Exchequer Courts were exclusively employed in the king's business with his subjects. The king also administered many matters of justice between his subjects in his council. His chancellor was the secretary of the council, and to him the petitions of the subject for redress came in the first instance. The chancellor examined the petitions, and referred the matter of the petitions to the King's Bench, Common Pleas, or Exchequer, according to the nature of the business. In cases where no proper redress could be had in any of those courts, the chancellor retained the petition in his own hands, and the king, or the chancellor, gave such relief as was judged proper. Hence arose the custom of inserting, in petitions to the king or his chancellor, the allegation that the petitioner had no complete and adequate remedy in the ordinary courts of law. See Bispham, Prin. of Eq. pp. 6-9. Thus the inadequacy and incompleteness of all legal remedy underlie the whole system of equity jurisprudence. But gradually the jurisdiction of the chancellor in giving relief where there was no adequate remedy at law became settled; and there grew up certain great heads of equity jurisdiction, and courts of equity took jurisdiction rather because they had jurisdiction in certain matters, than because there was no adequate and complete remedy at law in the particular case. Thus the jurisdiction of a court of equity at the present day in England is determined, not by the question whether there is an adequate remedy at law, but whether it has been the practice of the chancellor to take jurisdiction in similar matters.

(*d*) See Dr. Lieber's Encyc. Americana, art. *Equity*; Mitford, Eq. Plead. by Jeremy, 111, 112, 117, 123.

tion of a court of equity was, therefore, sometimes concurrent with the jurisdiction of a court of law; it was sometimes exclusive of it; and it was sometimes auxiliary to it.

§ 34. The author in the preceding paragraphs had led up to the discussion of the jurisdiction exercised by the Lord Chancellor, and in the concluding paragraphs expressed his approval of the divided jurisdictions of the common law courts and the court of chancery. There had been small attempts at fusion into one court which should give to suitors the actual relief to which they were entitled according to the facts proved, either by cumulation of remedies, or by allowing matters to be raised by way of defence, or by awarding one of two alternative measures of relief. Thus the 8 & 9 Will. III., c. 11 (*e*); 4 & 5 Anne c. 3 (*f*); and 7 Geo. II., c. 20, empowered the common law courts, in proceedings on bonds, to restrict the rights of the plaintiff within the limits laid down in courts of equity. Conversely the court of chancery was empowered by the Court of Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27) to award damages in cases where it exercised concurrent jurisdiction, instead of dismissing the bill, without prejudice to the right of the plaintiff to maintain proceedings at law (*g*). By the Judicature Act, 1873 (36 & 37 Vict. c. 66) one court administering law and equity was constituted. Still a clear understanding of the principles upon which the courts of chancery or of the common law acted is essential, for as has been said, the statute is not concerned with rights but with procedure. Accordingly, where the plaintiff is entitled to one of two alternative remedies, the relief granted will be that to which he would have been entitled upon the facts proved, and may in the circumstances have been lost (*h*). It may be added that the author limited his treatise to equity as administered in the court of chancery. There had been an equitable jurisdiction exercised by the court of exchequer, a jurisdiction transferred to the second Vice-Chancellor by statute 5 Vict. c. 5.

(*e*) *Tuther v. Caralampi*, 21 Q. B. D. 414.

(*f*) *Gerard v. Clowes*, [1892] 2 Q. B. 1.

(*g*) *Ferguson v. Wilson*, L. R. 2 Ch. 77.

(*h*) *Tamplin v. James*, 15 Ch. D. 215; *Olley v. Fisher*, 34 Ch. D. 367; *Lavery v. Pursell*, 39 Ch. D. 508; *General Accident Assurance Co. v. Noel*, [1902] 1 K. B. 377.

CHAPTER II.

THE ORIGIN AND HISTORY OF EQUITY JURISPRUDENCE.

§ 38. HAVING thus ascertained what is the true nature and character of Equity Jurisprudence, as it is administered in countries governed by the common law, it seemed proper, before proceeding to the consideration of the particulars of that jurisdiction, to take a brief review of its origin and progress. It is not intended here to speak of the common law jurisdiction of the Court of Chancery, or of any of its specially delegated jurisdiction in exercising the prerogatives of the Crown, as in cases of infancy and lunacy; or of its statutable jurisdiction in cases of bankruptcy (*a*). The inquiry will mainly relate to its equitable, or, as it is sometimes called, its extraordinary, jurisdiction (*b*).

§ 39. The origin of the Court of Chancery is involved in the same obscurity, which attends the investigation of many other questions, of high antiquity, relative to the common law (*c*). The administration of justice in England was originally confided to the *Aula Regis*, or great Court or Council of the King, as the Supreme Court of Judicature, which, in those early times, undoubtedly administered equal justice, according to the rules of both law and equity, or of either, as the case might chance to require (*d*). When that court was broken into pieces, and its principal jurisdiction distributed among various courts, the Common Pleas, the King's Bench, and the Exchequer, each received a certain portion, and the Court of Chancery also obtained a portion (*e*). But, at that period, the idea of a court of equity, as contradistinguished from a court of law, does not seem to have subsisted in the original plan of partition, or to have been in the

(*a*) See Com. Dig. Chancery, C. 1; 1 Mad. Ch. Pr. 262; 2 Mad. Ch. Pr. 447; *ibid.* 565; 3 Black. Comm. 426, 427, 428.

(*b*) 3 Black. Comm. 50; Com. Dig. Chancery, C. 2; 4 Inst. 79; 2 Inst. 552.

(*c*) Mitford, Pl. Equity, 1; Com. Dig. Chancery, A. 1; 4 Inst. 79; 1 Wooddes. Lect. vi.

(*d*) 3 Black. Comm. 50; 1 Reeves, Hist. 62, 63.

(*e*) 3 Black. Comm. 50; Com. Dig. Chancery, A. 1, 2, 3; 1 Collect. Jurid. 27 to 30; Parke, Hist. Chan. 16, 17, 28, 56; 1 Eq. Abridg. 129; Courts, B. note (*a*); 1 Wooddes. Lect. vi. pp. 174, 175; Gilb. For. Roman. 14; 1 Reeves, Hist. 59, 60, 63; Bac. Abridg. Court of Chancery, C.

contemplation of the sages of the day (*f*). Certain it is, that among the earliest writers of the common law, such as Bracton, Glanville, Britton, and Fleta, there is not a syllable to be found relating to the equitable jurisdiction of the Court of Chancery (*g*).

§ 39*a*. The author, in subsequent paragraphs, discussed at length the conflicting views of which Lord Coke's is perhaps the most virulent and the most inaccurate (*h*), respecting the antiquity of the jurisdiction. The Statute of Westminster the Second (13 Ed. 1, c. 24) had imposed upon the clerks in chancery the duty of framing writs to meet cases to which the older forms were inapplicable. It was one thing to frame the writs, but a totally different state of affairs arose when the actions instituted by these writs came before judges who were not bound to recognise the validity of the process. At some date the political head of the clerks in chancery intervened, sometimes with the approval of the common law judges (*i*), sometimes in antagonism to them (*k*). Lord Coke asserted that the jurisdiction arose in the time of Henry IV., and was concerned with feoffments to uses (*l*), or what would now be called the administration of trusts. But in 41 El., Lord Ellesmere produced a precedent in the time of Richard II., of a "decree en chancery per l'advice des judges," granting an injunction to restrain waste (*m*). And there seems no reason to doubt that a decree for the specific performance of an agreement was granted in the same reign (*n*).

§ 46. If confirmation were needed to establish the fact that the jurisdiction of chancery was established, and in full operation during the reign of Richard II., it is to be found in the recitals contained in the Remonstrances, and other proceedings of Parliament. At this period the extensive use or abuse of the powers of chancery had become an object of jealousy with Parliament; and various efforts were made to restrain and limit its authority. But the Crown steadily supported it (*o*). And the invention of the writ of subpœna by John Waltham, Bishop of Salisbury, who was Keeper of the Rolls, about the 5th of Richard II., gave great efficiency, if not expansion, to the jurisdiction (*p*). In the 13th of Richard II., the Commons prayed, that no party might be required to answer before the chancellor, or the council of the king, for any matter where a remedy is given by the

(*f*) 3 Black Comm. 50; The Legal Judic. in Chanc. stated (1727), ch. 2, p. 24.

(*g*) 3 Black. Comm. 50; Parke, Hist. Chan. 25; 4 Inst. 82; 1 Reeves, Hist. 61; 2 Reeves, Hist. 250, 251.

(*h*) 2 Inst. 552.

(*i*) Anon. F. Moo. 544, pl. 748.

(*k*) Roper's Life of Sir T. More, p. 25, ed. T. Hearne.

(*l*) 2 Inst. 552.

(*m*) Anon. F. Moo. 544, pl. 748.

(*n*) Fry, Spec. Perfce. § 34.

(*o*) 3 Parke, Hist. Chan. 39 to 44.

(*p*) 3 Reeves, Hist. 192 to 194; id. 274, 379, 380, 381; 3 Black. Comm. 52; Bac. Abr. Court of Chancery, C.

common law, unless it be by writ of *scire facias* in the county where it is found, by the common law. To which the king answered, that he would preserve his royalty, as his progenitors had done before him (*q*). And the only redress granted was by stat. 17 Rich. II. ch. 6, by which it was enacted, that the chancellor should have power to award damages to the defendant, in case the suggestions of the bill were untrue, according to his discretion (*r*). The struggles upon this subject were maintained in the subsequent reigns of Henry IV. and V. But the Crown resolutely resisted all appeals against the jurisdiction; and finally, in the time of Edward IV., the process by bill and subpœna had become the daily practice of the court (*s*).

§ 47. Considerable new light has been thrown upon the subject of the origin and antiquity of the equitable jurisdiction of the Court of Chancery, by the recent publication of the labours of the Commissioners on the Public Records. Until that period, the notion was very common (which was promulgated by Lord Ellesmere) that there were no petitions of the chancery remaining in the office of record, before the 15th year of the reign of Henry VI. But it now appears, that many hundreds have been lately found among the records of the Tower for nearly fifty years antecedent to the period mentioned by Lord Ellesmere, and commencing about the time of the passage of the statute of 17 Rich. II. ch. 6 (*t*). But there is much reason to believe, that, upon suitable researches, many petitions or bills, addressed to the chancellor, will be found of a similar character during the reigns of Edward I., Edward II., Edward III. (*u*).

(*q*) Parke, Hist. Chan. 41; 4 Inst. 82.

(*r*) Parke, Hist. Chan. 41, 42; 3 Black. Comm. 52; 4 Inst. 82, 83; 2 Reeves, Hist. 194.

(*s*) 3 Black. Comm. 53; Parkes, Hist. Chan. 45 to 57; 3 Reeves, Hist. 193, 194, 274, 379, 380.

(*t*) 1 Cooper, Pub. Rec. 355. I extract this statement from the preface to the Calendars of the Proceedings in Chancery, &c., published by the Record Commissioners in 1827. That preface is signed by Mr. Justice Bayley, sub-commissioner, but was in fact drawn up by Mr. Lysons, more than ten years before. Mr. Cooper, in his very valuable account of the Public Records, has published this preface verbatim; and has also extracted a letter of Mr. Lysons, written on the same subject in 1816. The preface and letter seem almost identical in language. 1 Cooper, Pub. Rec. ch. 18, p. 354; id. 384, note (*b*); id. 455 to 458. In the English Quarterly Jurist for January 1828 there will be found, in a review of these Calendars, a very succinct but interesting account of the contents of the early Chancery Cases, printed by the Record Commissioners.

(*u*) Mr. Cooper says that he "has made some inquiries, which induce him to think that there still exist among the records at the Tower many petitions, or bills, addressed to the chancellor, during the reigns of Edw. I., Edw. II., and Edw. III., similar to those addressed to that judge during the reign of Richard II., selections from which have been printed. Upon a very slight research, several documents of this description are stated to have been discovered; but only one of them has been seen by the compiler. It is dated the 38th year of Edward III." 1 Cooper, Pub. Rec. Addenda, pp. 454, 455. Mr. Barton says that, so early as the reign of Edward I., the chancellor began to exercise an original and independent jurisdiction, as a court of equity, in contradistinction to a court of law. Barton on Eq. Pr. Introd. p. 7.

§ 48. From the proceedings, which have been published by the Record Commissioners, it appears that the chief business of the Court of Chancery in those early times did not arise from the introduction of uses of land, according to the opinion of most writers on the subject. Very few instances of applications to the chancellor on such grounds occur among the proceedings of the chancery during the first four or five reigns after the equitable jurisdiction of the court seems to have been fully established. Most of these ancient petitions appear to have been presented to consequence of assaults, and trespasses, and a variety of outrages, which were cognizable at common law; but for which the party complaining was unable to obtain redress, in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county in which they occurred (x).

§ 49. If this be a true account of the earliest known exercises of equitable jurisdiction, it establishes the point that it was principally applied to remedy defects in the common-law proceedings; and, therefore, that equity jurisdiction was entertained upon the same ground which constituted the principal reason of its interference; namely, that a wrong was done, for which there was no plain, adequate, and complete remedy in the courts of common law (y). And in this way great strength is added to the opinions of Lord Hale and Lord Hardwicke, that its jurisdiction was in reality the residuum of that of the *Commune Concilium* or *Aula Regis*, not conferred on other courts, and necessarily exercisable by the Crown, as a part of its duty and prerogative to administer justice and equity (z). The introduction of uses or trusts at a later period may have given new activity and extended operation to the jurisdiction of the court; but it did not found it. The redress given by the chancellor in such cases was merely a new application of the old principles of the court; since there was no remedy at law to enforce the observance of such uses or trusts (a).

(x) This passage is a literal transcript from the preface to the Calendars in Chancery; and it is fully borne out by the examples of those bills and petitions given at large in the same work. Mr. Cooper, in his own work on the Public Records, has given an abstract, or marginal note, of all the examples thus given, from the reign of Richard II. to the reign of Richard III., amounting in number to more than one hundred. 1 Cooper, Pub. Rec. 359, 373; id. 377 to 385. As we proceed from the reign of Richard II. and advance to modern times, the cases become of a more mixed character, and approach to those now entertained in chancery.

(y) See Treatise on Subpœna, ch. 2; Harg. Law Tracts, pp. 333, 334.

(z) See Eunomus, Dial. 3, § 60; 1 Eq. Abrid. Courts, B. (a); Parkes, Hist. Chan. App. pp. 502, 503.

(a) See 3 Black. Comm. 52; 3 Reeves, Hist. 379, 381; Eunomus, Dial. 3, § 60; Parke, Hist. Chan. 28 to 31. The view which is here taken of the subject is confirmed by the remarks of the commissioners under the Chancery Commission in the 50th George III., whose report was afterwards published by parliament in 1826. The passage to which allusion is made is as follows: "The proceedings in the courts of common law are simple, and generally founded in certain writs of great

§ 50. From this slight review of the origin and progress of equitable jurisdiction in England, it cannot escape observation how naturally it grew up, in the same manner, and under the same circumstances, as the equitable jurisdiction of the Prætor at Rome. Each of them arose from the necessity of the thing in the actual administration of justice, and from the deficiencies of the positive law (the *lex scripta*), or from the inadequacy of the remedies in the prescribed forms to meet the full exigency of the particular case. It was not an usurpation for the purpose of acquiring and exercising power; but a beneficial interposition, to correct gross injustice, and to redress aggravated and intolerable grievances.

§ 51. But, be the origin of the equity jurisdiction of the Court of Chancery what it may, from the time of the reign of Henry VI. it constantly grew in importance (b); and, in the reign of Henry VIII. it expanded into a broad and almost boundless jurisdiction under the fostering care and ambitious wisdom and love of power of Cardinal Wolsey (c). Yet (Mr. Reeves observes), after all, notwithstanding the complaints of the cardinal's administration of justice, he has the reputation of having acted with great ability in the office of chancellor, which lay heavier upon him than it had upon any of his predecessors owing to the too great care with which he entertained suits, and the extraordinary influx of business, which might be attributed to other causes (d). Sir Thomas More, the successor to the cardinal, took a more sober and limited view of equity jurisprudence, and gave public

antiquity, conceived in prescribed forms. This adherence to prescribed forms has been considered as important to the due administration of justice in common cases. But, in progress of time, cases arose in which full justice could not be done in the courts of common law, according to the practice then prevailing. And, for the purpose of obtaining an adequate remedy, in such cases, resort was had to the extraordinary jurisdiction of the courts of equity, which alone had the power of examining the party on oath, and thereby acting through the medium of his conscience, and of procuring the evidence of persons not amenable to the jurisdiction of the courts of common law, and whose evidence therefore it was in many cases, impossible to obtain without the assistance of a court of equity. The application to this extraordinary jurisdiction, instead of being in the form of a writ, prescribed by settled law, seems always to have been in the form of a petition of the party or parties aggrieved, stating the grievance, the defect of remedy by proceedings in the courts of common law, and the remedy, which, it was conceived, ought to be administered. This mode of proceeding unavoidably left every complaining party to state his case, according to the particular circumstances, always asserting that the party was without adequate remedy at the common law."

(b) Parke, Hist. Chan. 55, 56; 3 Reeves, Hist. 379 to 382.

(c) 4 Reeves, Hist. 368, 369; Parke, Hist. Chan. 61, 62; 4 Inst. 91, 92. It seems that the first delegation of the powers of the lord chancellor to commissioners was in the time of Cardinal Wolsey. It will be found in Rymer's *Fœdera*, tom. 14, p. 299; Parke, Hist. of Chan. 60, 61. It was in the same reign that the Master of the Rolls (it is said) under a like appointment, first sat apart and used to hear causes at the Rolls in the afternoon. The master, who thus first heard causes, was Cuthbert Tunstall. 4 Reeves, Hist. of the Law, 368, 369; 5 Reeves, Hist. 160. But see Discourse on the Judicial Authority of the Master of the Rolls (1728), § 3, p. 83, &c.; id. § 4, p. 110, &c., ascribed to Sir Joseph Jekyll.

(d) 4 Reeves, Hist. 370.

favour as well as dignity to the decrees of the court. But still there were clamours from those who were hostile to equity during his time; and especially to the power of issuing injunctions to judgments and other proceedings in order to prevent irreparable injustice (*e*). This controversy was renewed with much greater heat and violence in the reign of James I. upon the point, whether a court of equity could give relief for or against a judgment at common law; and it was mainly conducted by Lord Coke against, and by Lord Ellesmere in favour of, the chancery jurisdiction. At last, the matter came directly before the king, and, upon the advice and opinion of very learned lawyers, to whom he referred it, his majesty gave judgment in favour of the equitable jurisdiction in such cases (*f*). Lord Bacon succeeded Lord Ellesmere; but few of his decrees, which have reached us, are of any importance to posterity (*g*). But his celebrated ordinances for the regulation of chancery gave a systematical character to the business of the court; and some of the most important of them still constitute the fundamental principles of its present practice (*h*).

§ 52. From this period, down to the time when Sir Heneage Finch (afterwards Earl of Nottingham) was elevated to the Bench (in 1673), little improvement was made, either in the principles or in the practice of chancery (*i*); and none of the persons who held the seals were distinguished for uncommon attainments or learning in their profession (*k*). With Lord Nottingham a new era commenced. He was a person of eminent abilities, and the most incorruptible integrity. He possessed a fine genius, great liberality of views, and a thorough comprehension of the true principles of equity; so that he was enabled to disentangle the doctrines from any narrow and technical notions,

(*e*) Sir James Mackintosh's *Life of Sir Thomas More*; 4 Reeves, *Hist.* 370 to 376; Parke, *Hist. Chan.* 63 to 65. There is a curious anecdote related of Sir Thomas More, who invited the judges to dine with him, and, after dinner, showed them the number and nature of the causes in which he had granted injunctions to judgments of the court of common law; and the judges, upon full debate of the matters, confessed that they could have done no otherwise themselves. The anecdote is given at large in Mr. Cooper's *Lettres sur la Cour de la Chancellerie*, Letter 25, p. 185, note 1, from Roper's *Life of Sir Thomas More*, ed. T. Hearne, 23.

(*f*) 1 *Collect. Jurid.* 23, &c.; 3 *Black. Comm.* 54; Parke, *Hist. Chan.* 80. The controversy gave rise to many pamphlets, not only at the time, but in later periods. The learned reader, who is inclined to enter upon the discussion of these points, now of no importance, except as a part of the juridical history of England, may consult advantageously the following works: *Observations concerning the Office of Lord Chancellor*, published in 1651, and ascribed (though it is said incorrectly) to Lord Ellesmere. *Discourse concerning the Judicial Authority of the Master of the Rolls*, p. 51. *A Vindication of the Judgment of King James. &c.*, printed in an Appendix to the first volume of *Reports in Chancery*, and in 1 *Collect. Jurid.* 23, &c.; the several *Treatises on the Writ of Subpoena in Chancery*, and the *Abuses and Remedies in Chancery*, in Hargreave's *Law Tracts*, pp. 321, 425; and 4 Reeves, *Hist. of the Law*, pp. 370 to 377; 2 *Swanst.* 24, note.

(*g*) 3 *Black. Comm.* 55.

(*h*) See Bacon's *Ord. in Chancery*, by Beames.

(*i*) 3 *Black. Comm.* 55.

(*k*) See Parke, *Hist. Chan.* 92 to 210.

and to expand the remedial justice of the court far beyond the aims of his predecessors. In the course of nine years, during which he presided in the court, he built up a system of jurisprudence and jurisdiction upon wide and rational foundations which served as a model for succeeding judges, and gave a new character to the court (l); and hence he has been emphatically called "the father of equity" (m). His immediate successors availed themselves very greatly of his profound learning and judgment. But a successor was still wanted, who with equal genius, abilities, and liberality, should hold the seals for a period long enough to enable him to widen the foundation and complete the structure, begun and planned by that illustrious man. Such a successor at length appeared in the person of Lord Hardwicke. This great judge presided in the Court of Chancery during the period of twenty years; and his numerous decisions evince the most thorough learning, the most exquisite skill, and the most elegant juridical analysis. There reigns, through all of them, a spirit of conscientious and discriminating equity, a sound and enlightened judgment, as rare as it is persuasive, and a power of illustration from analogous topics of the law, as copious as it is exact and edifying. Few judges have left behind them a reputation more bright and enduring; few have had so favourable an opportunity of conferring lasting benefits upon the jurisprudence of their country; and still fewer have improved it by so large, so various, and so important contributions. Lord Hardwicke, like Lord Mansfield, combined with his judicial character the still more embarrassing character of a statesman, and, in some sort, of a minister of state. Both of them, of course, encountered great political opposition (whether rightly or wrongfully, it is beside the purpose of this work to inquire); and it is fortunate for them, that their judicial labours are embodied in solid volumes, so that, when the prejudices and the passions of the times are passed away, they may remain open to the severest scrutiny, and claim from posterity a just and unimpeachable reward (n).

§ 53. This short and imperfect sketch of the origin and history of equity jurisdiction in England will be here concluded. It has not been inserted in this place from the mere desire to gratify those whose curiosity may lead them to indulge in antiquarian inquiries, laudable and interesting as it may be. But it seemed, if not indispensable, at least important, as an introduction to a more minute

(l) Mr. Justice Blackstone has pronounced a beautiful eulogy on him, in 3 Black. Comm. 58, from which the text is, with slight alterations, borrowed. See also 4 Black. Comm. 442.

(m) 1 Mad. Ch. Pr. Preface, 13. See Parke, Hist. Chan. 211, 212, 213, 214; 1 Kent, Comm. Lect. 21, p. 492 (2nd edit.).

(n) See 1 Kent, Comm. Lect. 21, p. 494 (2nd edit.), and Lord Kenyon's opinion in *Goodtitle v. Otway*, 7 T. R. 411. See also 1 Butler's Reminis. § 11, n. 1, 2, pp. 104 to 116. Lord Eldon, in *Ex parte Greenway*, 6 Ves. 812, said, "He [Lord Hardwicke] was one of the greatest judges that ever sat in Westminster Hall."

and exact survey of that jurisdiction, as administered in the present times. In the first place, without some knowledge of the origin and history of Equity Jurisdiction, it will be difficult to ascertain the exact nature and limits of that jurisdiction; and how it can, or ought to, be applied to new cases, as they arise. If it be a mere arbitrary, or usurped jurisdiction, standing upon authority and practice, it should be confined within the very limits of its present range; and the *terra incognita*, and the *terra prohibita*, ought to be the same, as to its boundaries. If, on the other hand, its jurisdiction be legitimate, and founded in the very nature of remedial justice, and in the delegation of authority in all cases, where a plain, adequate, and complete remedy does not exist in any other court, to protect acknowledged rights, and to prevent acknowledged wrongs (that is, acknowledged in the municipal jurisprudence), then it is obvious, that it has an expansive power, to meet new exigencies; and the sole question, applicable to the point of jurisdiction, must from time to time be, whether such rights and wrongs do exist, and whether the remedies therefor in other courts, and especially in the courts of common law, are full, and adequate to redress. If the present examination (however imperfect) has tended to any result, it is to establish, that the latter is the true and constitutional predicament and character of the Court of Chancery.

§ 54. In the next place, a knowledge of the origin and history of equity jurisdiction will help us to understand, and in some measure to explain, as well as to limit, the anomalies, which do confessedly exist in the system. We may trace them back to their sources, and ascertain how far they were the result of accidental, or political, or other circumstances; of ignorance, or perversity, or mistake in the judges; of imperfect development of principles; of narrow views of public policy; of the seductive influence of prerogative; or, finally, of a spirit of accommodation to the institutions, habits, laws, or tenures of the age, which have long since been abolished, but have left the scattered fragments of their former existence behind them. We shall thus be enabled to see more clearly, how far the operation of these anomalies should be strengthened or widened; when they may be safely disregarded, in their application, to new cases and new circumstances; and when, through a deformity in the general system, they cannot be removed, without endangering the existence of other portions of the fabric, or interfering with the proportions of other principles, which have been moulded and adjusted with reference to them.

§ 55. In the next place, such a knowledge will enable us to prepare the way for the gradual improvement, as well of the science itself, as of the system of its operations. Changes in law, to be safe, must be slowly and cautiously introduced, and thoroughly examined. He who is ill-read in the history of any law, must be ill-prepared to know its

reasons as well as its effects. The causes or occasions of laws are sometimes as important to be traced out as their consequences. The new remedy to be applied may, otherwise, be as mischievous as the wrong to be redressed. History has been said to be philosophy teaching by examples; and to no subject is this remark more applicable than to law, which is emphatically the science of human experience. A sketch, however general, of the origin and sources of any portion of jurisprudence, may at least serve the purpose of pointing out the paths to be explored; and, by guiding the inquirer to the very places he seeks, may save him from the labour of wandering in the devious tracks, and of bewildering himself in mazes of errors as fruitless as they may be intricate.

§ 55a. The High Court of Chancery, which was, as we have seen, a Court distinct from, and superior to, the Courts of Common law, was abolished by the Supreme Court of Judicature Act, 1873 (o), and, together with the Courts of Common law and the Courts of Probate, Divorce, and Admiralty, was constituted one Supreme Court of Judicature in England. This Supreme Court consists of two divisions—the High Court of Justice and the Court of Appeal—and the High Court of Chancery has to a large extent become the Chancery Division of the High Court of Justice. To this Chancery Division are assigned (p) all causes and matters for any of the following purposes:—

The administration of the estates of deceased persons.

The dissolution of partnerships or the taking of partnership or other accounts.

The redemption or foreclosure of mortgages.

The raising of portions or other charges on land.

The sale and distribution of the proceeds of property subject to any lien or charge.

The execution of trusts, charitable or private.

The rectification, or setting aside, or cancellation of deeds or other written instruments.

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases.

The partition or sale of real estates.

The wardship of infants and the care of infants' estates.

Since this Act other matters have been assigned by various statutes to the Chancery Division; *e.g.*, those arising under the Conveyancing Act, 1881 (q), the Settled Land Act, 1882 (r), and the Guardianship of Infants Act, 1886 (s).

The Judicature Act, 1873, further provides for the recognition by all divisions of the High Court of the principles formerly adopted.

(o) 36 & 37 Vict. c. 66, s. 3.

(p) Sect. 34.

(q) 44 & 45 Vict. c. 41, s. 63.

(r) 45 & 46 Vict. c. 38, s. 49.

(s) 49 & 50 Vict. c. 27, s. 9.

by the Court of Chancery, for by s. 24 of this Act it is provided that, for the future, claims by a plaintiff to any equitable estate or right, or to relief on any equitable ground, are to be recognised by all branches of the court; as also are claims by a defendant to an equitable estate or right or relief on equitable grounds; and whenever equitable estates, titles, rights, duties, and liabilities appear incidentally they are to be recognised (t). The effect of this is that the court is now neither a court of law nor a court of equity, but a court of complete jurisdiction (u); and, if there were a variance between what before the Act a court of law and a court of equity would have done, the rules of the court of equity must now prevail (x).

The Act, after having in particular instances (y) enacted that certain rules of equity should prevail, further provides by sub-s. 11 of s. 25, that generally in all matters not hereinbefore particularly "mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail."

The Act further did away altogether with the auxiliary jurisdiction of the Court of Chancery. First, as to an injunction. This originally had been a remedy peculiar to the Court of Chancery, and, although power was conferred upon the courts of common law to grant an injunction by ss. 79 to 82 of the Common Law Procedure Act, 1854, as amended by ss. 32 and 33 of the Common Law Procedure Act, 1860, these Acts only allowed the plaintiff to ask for this peculiar remedy when the wrong had actually been committed; but now by s. 25, sub-s. 8, of the Judicature Act, 1873, "an injunction may be granted in any case in which it shall appear to the court to be just or convenient that such order should be made" (z).

The injunction by means of which the Court of Chancery used to stay proceedings in the common law and other courts, where the defendant had a good equitable defence, is now obsolete; but by s. 24, sub-s. 5, of the Judicature Act, 1873, it is provided that no cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction; but every matter of equity in which an injunction against the prosecution of any cause or proceeding might have been obtained

(t) Sub-sections. 2, 3, and 4.

(u) *Tamplin v. James*, 15 Ch. D. 215.

(x) Per Lord Cairns, in *Pugh v. Heath*, 7 App. Cas. 237. But in *Joseph v. Lyons* (5 Q. B. D. 280), it was held that the Judicature Acts had not abolished the distinction between legal and equitable interests; they merely enable the High Court to administer legal and equitable remedies. *Vide per Cotton, L.J.*, 5 Q. B. D. 280.

(y) See sub-sections. 2, 3, 4, 7, and 10, all of which will be referred to afterwards.

(z) This section does not alter the principles on which injunctions were formerly granted; but, in ascertaining what is just, regard must be had to what is convenient (*Day v. Brownrigg*, 10 Ch. D. 307). And an injunction may be granted even on an interlocutory application (sub-s. 8). See also R. S. C. Ord. 1. r. 6. See also § 873 a, b, c, *infra*.

if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto (a).

Next, as to discovery. Discovery could formerly be obtained only by means of a bill in the Court of Chancery, but power to grant discovery was conferred on the courts of common law by ss. 51 and 52 of the Common Law Procedure Act, 1854.

But this right was only a limited right, and the custom and practice of discovery in the common law courts differed from that prevailing in the Court of Chancery. The present practice in discovery depends "upon the orders and rules of the Judicature Acts." But in them the extended principles of the Court of Chancery were followed rather than the narrower practice of the courts of common law itself derived from the practice in equity (b).

Thus, under the Judicature Act the practice in discovery is a new intermediate practice; but where there is any conflict or variance between the rules of common law and equity, with reference to the same matter, the rule of equity will prevail (c).

The next remedy of the Court of Chancery was the appointment of a receiver. S. 25, sub-s. 8, of the Judicature Act gives power to any division of the High Court to appoint a receiver, a power originally vested only in the Court of Chancery (d).

From the above concise account it will be seen that the changes made by the Judicature Act relate in a very slight degree, if at all, to the principles of equity jurisprudence which are the subject of the present treatise (e).

It has not been thought necessary to alter the phrases "Court of Chancery" or "courts of equity," but these phrases must be understood, since 1873, to signify the Chancery Division of the High Court of Justice and the Court of Appeal therefrom. In the same way the phrase "courts of common law" means, since the Order in Council made 16th December, 1880, in pursuance of s. 32 of the Judicature Act, 1873, the King's Bench Division of the High Court.

(a) An injunction may still be granted to restrain a person from *instituting* proceedings (*Besant v. Wood*, 12 Ch. D. 630). So, too, an injunction may be granted to restrain proceedings in inferior courts, or in tribunals constituted for a special purpose, or in tribunals of foreign countries. See *Annual Practice*, and *Kerr on Injunctions*, 3rd ed., pp. 576-7. The same sub-section provides that any court may stay proceedings in any matter before it.

(b) *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556, per Brett, L.J., at 558.

(c) *Bustros v. White*, 1 Q. B. D. 426. The present practice as to discovery is regulated by Ord. xxxi. R. S. C. (1883). See *infra*, § 1480.

(d) See, as to the grounds on which the Court of Chancery appointed a receiver, *infra*, § 829 and following sections.

(e) Since the Judicature Act, 1873, the Lord Chancellor has not sat as a Judge of a Court of First Instance; and since the Judicature Act, 1881 (44 & 45 Vict. c. 68), the Master of the Rolls has been a Judge of Appeal only. Since the Judicature Act, 1873, no new Vice-Chancellor has been created, and the old Court of Chancery Appeal was merged in the Court of Appeal of the Supreme Court by the same enactment.

CHAPTER III.

GENERAL VIEW OF EQUITY JURISDICTION.

§ 59. HAVING traced out the nature and history of Equity Jurisprudence, we are naturally led to the consideration of the various subjects which it embraces, and the measure and extent of its jurisdiction. Courts of equity, in the exercise of their jurisdiction, may, in a general sense, be said to have differed from common law, in the modes of trial, in the modes of proof, and in the modes of relief. One or more of these elements will be found essentially to have entered, as an ingredient, into every subject over which they exerted their authority. Lord Coke has, in his summary manner, stated, that three things were to be judged of in the court of conscience or equity: covin, accident, and breach of confidence (*a*); or, as we should now say, matters of fraud, accident, and trust. Mr. Justice Blackstone has also said, that courts of equity were established “to detect latent frauds and concealments which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune, or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law” (*b*).

§ 60. These, as general descriptions, are well enough; but they are far too loose and inexact to subserve the purposes of those who seek an accurate knowledge of the actual, or supposed, boundaries of equity jurisdiction. Thus, for example, although fraud, accident, and trust are proper objects of courts of equity, it is by no means true that they are exclusively cognizable therein. On the contrary, fraud is, in many cases, cognizable in a court of law. Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee, or by a stranger, avoids it as to the other

(*a*) 4 Inst. 84; Com. Dig. Chancery, Z.; 3 Black. Comm. 431; 1 Eq. Abr. Courts, B. § 4, p. 130; Bac. Abridg. Court of Chancery, C.

(*b*) 1 Black. Comm. 92. And see 3 Black. Comm. 429 to 432.

party, at law (c). And, sometimes, fraud, such as fraud in obtaining a will, or devise of lands, is cognizable there (d). Many cases of accidents are remediable at law, such as losses of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases. And even trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law; as, for instance, cases of bailments, and that larger class of cases, where the action for money had and received for another's use is maintained *ex æquo et bono* (e).

§ 61. On the other hand, there are cases of fraud, of accident, and of trust, which neither courts of law, nor of equity, presume to relieve or mitigate. And, where the law has determined a matter, with all its circumstances, equity cannot (as we have seen) intermeddle against the positive rules of law. And, therefore, equity will not interfere in such cases, notwithstanding accident, or unavoidable necessity. This was long ago remarked by Lord Talbot, who, after saying, "There are instances, indeed, in which a court of equity gives remedy, where the law gives none," added: "But where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up, where the law leaves it, and extend it further than the law allows." And upon this ground, relief was refused to a creditor of the wife against her husband, after her death, though he had received a large fortune with her on his marriage (f). So, a man may by accident omit to make a will, appointment, or gift, in favour of some friend or relative; or he may leave his will unfinished; and yet there can be no relief (g). And many cases of the non-performance of conditions are equally without redress (h). So, cases of trust may exist, in which the parties must abide by their own false confidence in others, without any aid from courts of justice. Thus, in cases of illegal contracts, or those in which one party has placed property in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must abide by his loss; for *In pari delicto melior est conditio possidentis, et defendantis*, is a maxim of public policy equally respected in courts of law and courts of equity (i). And, on the other hand, where the fraud is perpetrated by one party only, still, if it involves a public crime, and redress

(c) *Thoroughgood's Case*, 2 Co. 9 a; *Shulter's Case*, 12 Co. 90; *Jenkin's Cent.* 166.

(d) 1 Hovenden on Frauds, Introd. p. 16; *id.* ch. 10, p. 252.

(e) 3 Black. Comm. 431, 432.

(f) *Heard v. Stanford*, Cas. temp. Talb. 174.

(g) *Tollet v. Tollet*, 2 P. Wms. 489; *Poole v. Shergold*, 10 Ves. 370; *Martin v. Cooper*, L. R. 3 Ch. 47.

(h) *In re Emson*; *Grain v. Grain*, 74 L. J. Ch. 565; *In re Lewis*; *Lewis v. Lewis*, 1904, 2 Ch. 656.

(i) *Curtis v. Perry*, 6 Ves. 739; *Ewing v. Osbaldiston*, 2 M. & Cr. 53.

cannot be obtained, except by a discovery of the facts from him personally, the law will not compel him to accuse himself of a crime; and therefore the case is one of irremediable injury.

§ 62. These are but a few among many instances, which might be selected, to establish the justice of the remark, that even in cases professedly within the scope of equity jurisdiction, such as fraud, accident, and trust, there are many exceptions; and that all that can be ascribed to such general allegations is general truth. The true nature and extent of equity jurisdiction, as at present administered, must be ascertained by a specific enumeration of its actual limits in each particular class of cases, falling within its remedial justice. This will, accordingly, be done in the subsequent pages.

§ 63. We may here notice some of those maxims and general axioms, which are of frequent recurrence in the discussion of equity jurisprudence.

§ 64. In the first place, it is a common maxim, that equity follows the law, *Æquitas sequitur legem* (*k*). This maxim is susceptible of various interpretations. It may mean, that equity adopts and follows the rules of law in all cases to which those rules may, in terms, be applicable; or it may mean, that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. Now, the maxim is true in both of these senses, as applied to different cases and different circumstances. It is universally true in neither sense; or rather, it is not of universal application (*l*). Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it (*m*). If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation. Thus, since the law has declared that the eldest son shall take by descent the whole undivided estate of his parent, except in the case of gavelkind lands, a court of equity cannot disregard the canon of descent; but must give full effect and vigour to it in all controversies, in which the title is asserted. And yet, there are cases in which equity will control the legal title of an heir, general or special, when it would be deemed absolute at law; and in which, therefore, so far from following the law, it openly abandons it. Thus, if a tenant in tail, not knowing the fact, should, upon his

(*k*) *In re Irwin*; *Irwin v. Parkes*, 1904, 2 Ch. 752. See *Dixon v. Enoch*, L. R. 13 Eq. 394, for a statutory exception to the rule.

(*l*) Sir Thomas Clarke (Master of the Rolls), in one of his elaborate opinions, has remarked, in regard to uses and trusts, that, at law, the legal operation controls the intent; but, in equity, the intent controls the legal operation of the deed. *Burgess v. Wheate*, 1 W. Black. 137. See also *In re Thursby*; *Grant v. Littledale*, 1910, 2 Ch. 181; 79 L. J. Ch. 638.

(*m*) *Curtis v. Perry*, 6 Ves. 739; *Thompson v. Leake*, 1 Madd. 39; *Ewing v. Osbaldiston*, 2 M. & Cr. 53.

marriage, make a settlement on his wife, and the heir in tail should engross the settlement, and conceal the fact, although at law his title would be absolute, a court of equity would have awarded a perpetual injunction against asserting it to the prejudice of the settlement (*n*). So, if an heir-at-law should, by parol, promise his father to pay his sisters' portions, if he would not direct timber to be felled to raise them; although discharged at law, he would in equity be deemed liable to pay them, in the same way, as if they had been charged on the land (*o*). And many cases of a like nature may be put (*p*).

§ 64a. So, in many cases, equity acts by analogy to the rules of law in relation to equitable titles and estates. Thus, although the statutes of limitations were in their terms applicable to courts of law only (*q*), yet equity, by analogy, acts upon them, and refuses relief under like circumstances. Equity always discountenances laches, and holds that laches is presumable in cases where it is positively declared at law. Thus, in cases of equitable titles in land, equity requires relief to be sought within the same period in which an ejectment would lie at law; and, in cases of personal claims, it also requires relief to be sought within the period prescribed for personal suits of a like nature (*r*). And yet there are cases in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and, on the other hand, there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief (*s*). But all these cases stand on special circumstances, which courts of equity can take notice of when courts of law may be bound by the positive bar of the statutes. And there are many other cases where the rules of law and equity on similar subjects are not exactly co-extensive as to the recognition of rights or the maintenance of remedy. Thus, a person may be tenant by the courtesy of his wife's trust estate, but she was not, till the 3 & 4 Will. IV. c. 105, entitled to dower in his trust estate. So, where a power is defectively executed, equity will often aid it; whereas, at law, the appointment is wholly nugatory.

§ 64b. Other illustrations of the same maxim may be drawn from the known analogies of legal and trust estates. In general, in courts

(*n*) *Raw v. Potts*, Prec. Ch. 35.

(*o*) *Dutton v. Poole*, 1 Vent. 318.

(*p*) *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Mestaer v. Gillespie*, 11 Ves. 621; *Middleton v. Middleton*, 1 J. & W. 94. These cases proceed upon the ground of concealed fraud, by not allowing a party to use a mere technical advantage for the accomplishment of positive injustice; and in a manner which the law never contemplated. So that equity here does not dispense with the law, but merely supplies its defects.

(*q*) *Hovenden v. Lord Annesley*, 2 Sch. & L. 607; *Talmarsh v. Mugleston*, 4 L. J. O. S. Ch. 200; *Masonic General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154.

(*r*) *Smith v. Clay*, 3 Bro. C. C. 640, note; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 156; 4 Bligh. 1.

(*s*) See *Pickering v. Lord Stamford*, 2 Ves. Jun. 279, 582; *Gibbs v. Guild*, 9 Q. B. D. 59; *Oelkers v. Ellis*, [1914] 2 K. B. 139.

of equity, the same construction and effect are given to perfect or executed trust estates as are given by courts of law to legal estates. The incidents, properties, and consequences of the estates are the same. The same restrictions are applied as to creating estates and bounding perpetuities, and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted. But there are exceptions, as well known as the rule itself. Thus, executory trusts are treated as susceptible of various modifications and constructions not applicable to executed trusts. And, even at law, the words in a will are or may be differently construed when applied to personal estate, from what they are when applied to real estate. In short, it may be correctly said that the maxim, that equity follows the law, is a maxim liable to many exceptions; and that it cannot be generally affirmed, that where there is no remedy at law in the given case, there is none in equity; or, on the other hand, that equity, in the administration of its own principles, is utterly regardless of the rules of law.

§ 64c. Another maxim is, that where there is equal equity the law must prevail. And this is generally true; for, in such a case, the defendant has an equal claim to the protection of a court of equity for his title as the plaintiff has to the assistance of the court to assert his title; and then the court will not interpose on either side, for the rule there is, “*In æquali jure melior est conditio possidentis.*” And the equity is equal between persons who have been equally innocent and equally diligent. It is upon this account that a court of equity constantly refuses to interfere, either for relief or discovery, against a *bonâ fide* purchaser of the legal estate for a valuable consideration, without notice of the adverse title, if he chooses to avail himself of the defence at the proper time and in the proper mode. And it extends its protection equally, if the purchase is originally of an equitable title without notice, and afterwards, with notice, the party obtains or buys in a prior legal title, in order to support his equitable title. This doctrine applies strictly in all cases where the title of the plaintiff seeking relief is equitable; it is inapplicable to the case of a plaintiff seeking equitable relief based upon a legal title (*t*). The purchaser, however, in all cases, must hold a legal title, or be entitled to call for it, in order to give him a full protection of his defence; for, if his title be merely equitable, then he must yield to a legal and equitable title in the adverse party. So, the purchaser must have paid his purchase-money before notice, for otherwise he will not be protected; and if he have paid a part only, he will be protected *pro tanto* only (*u*).

(*t*) *Collins v. Archer*, 1 Russ. & M. 284; *Heath v. Crealock*, L. R. 10 Ch. 22; *Ind Coope & Co. v. Emmerson*, 12 App. Cas. 300.

(*u*) *Jackson v. Rowe*, 4 Russ. 514, further proceedings, 9 L. J. (O.S.) Ch. 32.

§ 64d. But, even when the title of each party is purely equitable, it does not always follow that the maxim admits of no preference of the one over the other. For, where the equities are in other respects equal, still another maxim may prevail, which is “*Qui prior est in tempore, potior est in jure*”; for precedency in time will, under many circumstances, give an advantage, or priority in right. Hence, when the legal estate is outstanding, equitable incumbrances on real estate must be paid according to priority of time (x). But if the legal estate in personalty is outstanding, the person who first gives notice of his incumbrance to the debtor or trustee will have the preference (y). And whenever the equities are unequal, there the preference is constantly given to the superior equity.

§ 64e. Another maxim of no small extent is, that he who seeks equity, must do equity. This maxim principally applies to the party who is seeking substantive relief, in the character of a plaintiff in the court (z). Expectant heirs and reversioners must offer to repay the sums actually received by them together with interest (a); a mortgagor or puisne incumbrancer must offer to redeem (b), and many other illustrations of the maxim might be put.

§ 64f. Another maxim of general use is, that equality is equity; or, as it is sometimes expressed, equity delighteth in equality. And this quality, according to Bracton, constitutes equity itself: “*Æquitas est rerum convenientia, quæ paribus in causis paria jura desiderat, et omnia vere co-æquiparat, et dicitur æquitas, quasi æqualitas.*” This maxim is variously applied; as, for example, to cases of contribution between co-contractors, sureties, and others; to cases of abatement of legacies, where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of the land; and especially to cases of the marshalling and the distribution of equitable assets, which were applied in payment of debts proportionally, without reference to their dignity, or priority of right at law, except as regards Crown debts. And here we have another illustration of the doctrine, that equity does not always follow the law.

§ 64g. Another, and the last, maxim which it seems necessary to notice is, that equity looks upon that as done, which ought to have been done. The true meaning of this maxim is, that equity will treat the subject-matter, as to collateral consequences, and incidents, in the same manner as if the final acts contemplated by the parties had

(x) *Phillips v. Phillips*, 4 De G. F. & J. 208; *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263.

(y) *Dearle v. Hall*, 3 Russ. 1.

(z) *Dingle v. Cooper*, [1899] 1 Ch. 726; *In re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Hanson v. Keating*, 4 Hare, 1.

(a) *Croft v. Graham*, 2 De G. J. & S. 71; *Beynon v. Cook*, L. R. 10 Ch. 389.

(b) *Gordon v. Horsefall*, 5 Moo. P. C. 393; *Inman v. Wearing*, 3 De G. & S. 729.

been executed exactly as they ought to have been; not as the parties might have executed them. But equity will not thus consider things in favour of all persons; but only in favour of such as have a right to pray that the acts might be done (*c*). And the rule itself is not, in other respects, of universal application; although Lord Hardwicke said that it holds in every case except in dower (*d*). The most common cases of the application of the rule are under agreements. All agreements are considered as performed, which are made for a valuable consideration, in favour of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed. They are also deemed to have the same consequences attached to them; so that one party, or his privies, shall not derive benefit by his laches or neglect; and the other party, for whose profit the contract was designed, or his privies, shall not suffer thereby. Thus, money, covenanted, or devised, to be laid out in land, is treated as real estate in equity, and descends to the heir. And, on the other hand, where land is contracted, or devised, to be sold, the land is considered and treated as money. There are exceptions to the doctrine, where other equitable considerations intervene, or where the intent of the parties leads the other way, as where the sale is conditional; but these demonstrate rather than shake the potency of the general rule.

(*c*) *In re Austin, Chetwynd v. Morgan*, 31 Ch. D. 596.

(*d*) *Crabtree v. Bramble*, 3 Atk. 681.

CHAPTER IV.

CONCURRENT JURISDICTION OF EQUITY—ACCIDENT.

§ 75. HAVING disposed of these matters, which may in some sort be deemed preliminary, the next inquiry which will occupy our attention, is to ascertain the true boundaries of the jurisdiction exercised by courts of equity. The subject here naturally divides itself into three great heads,—the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction (*a*). As the concurrent jurisdiction is that which is of the greatest extent, and most familiar occurrence in practice, I propose to begin with it.

§ 76. The concurrent jurisdiction of courts of equity may be truly said to embrace, if not all, at least a very large portion of the original jurisdiction, inherent in the court from its very nature, or first conferred upon it, at the dissolution or partition of the powers of the Great Council, or *Aula Regis*, of the King. We have already seen, that it did not take its rise from the introduction of technical uses or trusts, as has sometimes been erroneously supposed (*b*). Its original foundation, then, may be more fitly referred to what Lord Coke deemed the true one,—fraud, accident, and confidence (*c*). In many cases of this sort, courts of common law, prior to the Judicature Act, 1873, had been accustomed to exercise jurisdiction, and to afford an adequate remedy. And in many other cases, in which anciently no such remedy was allowed, their jurisdiction was expanded, so as effectually to reach them. Still, however, there were many cases of fraud, accident, and confidence, which either courts of law did not attempt to redress at all; or, if they did, the redress which they afforded was inadequate and defective. The concurrent jurisdiction, then, of equity, has its true origin in one of two sources: either the courts of law, although they had general jurisdiction in the matter, could not give adequate, specific, and perfect relief; or, under the actual circumstances of the case, they could not give any relief at all. The former occurred in all cases, when a simple judgment for the plaintiff, or for the defendant, did not meet the full merits and exigencies of the case; but a variety of adjustments, limitations, and cross claims

(*a*) *Ante*, § 42, 43; 1 Cooper's Public Records, 357.

(*b*) 4 Inst. 84; 3 Black. Comm. 431.

(*c*) 4 Inst. 84; 3 Black. Comm. 431, 432.

were to be introduced, and finally acted on; and a decree, meeting all the circumstances of the particular case between the very parties, was indispensable to complete distributive justice. The latter occurred, when the object sought was till recent legislation incapable of being accomplished by the courts of law; as, for instance, a perpetual injunction, or a preventive process, to restrain trespasses, nuisances, or waste. It may, therefore, be said, that the concurrent jurisdiction of equity extended to all cases of legal rights, where, under the circumstances, there is not a plain, adequate, and complete remedy at law.

§ 77. The subject, for convenience, may be divided into two branches: (1) that, in which the subject-matter constituted the principal (for it rarely constituted the sole) ground of the jurisdiction; and (2) that, in which the peculiar remedies afforded by courts of equity constituted the principal (although not always the sole) ground of the jurisdiction. Of these we shall endeavour to treat successively in their order, beginning with that of the subject-matter, where the relief was deemed more adequate, complete, and perfect in equity than at common law; but where the remedy was not, or, at least, might not be, of a peculiar and exclusive character. It is proper, however, to add, that as the grounds of jurisdiction often run into each other, any attempt at a scientific method of distribution of the various heads would be impracticable and illusory.

§ 78. And, in the first place, let us consider the cases, where the jurisdiction arises from accident. By the term *accident* is here intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party. Lord Cowper, speaking on the subject of accident, as cognizable in equity, said: "By accident is meant when a case is distinguished from others of the like nature by unusual circumstances" (*d*); a definition quite too loose and inaccurate, without some further qualifications; for it is entirely consistent with the language, that the unusual circumstances may have resulted from the party's own gross negligence, folly, or rashness.

§ 79. The jurisdiction of the court, arising from accident, in the general sense already suggested, is a very old head in equity, and probably coeval with its existence (*e*). But it is not every case of accident which will justify the interposition of a court of equity (*f*). The jurisdiction, being concurrent, will be maintained only, first, when a court of law cannot grant suitable relief; and, secondly,

(*d*) *Earl of Bath v. Sherwin*, 10 Mod. 1.

(*e*) See *East India Co. v. Boddam*, 9 Ves. 464; *Armitage v. Wadsworth*, 1 Mad. 189 to 193.

(*f*) *Whitfield v. Fausset*, 1 Ves. Sen. 392, 393.

when the party has a conscientious title to relief. Both grounds must concur in the given case; for otherwise a court of equity not only may, but is bound to withhold its aid. Mr. Justice Blackstone has very correctly observed, that, “many accidents are supplied in a court of law; as loss of deeds, mistakes in receipts and accounts, wrong payments, deaths, which made it impossible to perform a condition literally, and a multitude of other contingencies. And many cannot be redressed, even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement (g).

§ 80. The first consideration then is, whether there is an adequate remedy at law, not merely whether there is some remedy at law. And here a most material distinction is to be attended to. In more recent times, courts of law frequently interfered, and granted a remedy under circumstances in which it would certainly have been denied in earlier periods. And, sometimes, the legislature, by express enactments, conferred on courts of law the same remedial faculty which belonged to courts of equity. Now (as we have seen), in neither case, if the courts of equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of the authority at law in regard to legislative enactments; for, unless there are prohibitory or restrictive words used, the uniform interpretation is, that they confer concurrent and not exclusive remedial authority. And it would be still more difficult to maintain that a court of law, by its own act, could oust or repeal a jurisdiction already rightfully attached in equity (h).

§ 81. One of the most common interpositions of equity under this head was in the case of lost bonds or other instruments under seal. Originally the doctrine prevailed that there could be no remedy on a lost bond in a court of common law, because there could be no *profert* of the instrument, without which the declaration would be fatally defective; but about 1750 the court of law commenced to entertain the jurisdiction, and dispense with the *profert*, if an allegation of loss, by time and accident, was stated in the declaration (i). But this circumstance was not permitted in the slightest degree to change the course in equity (k).

§ 82. Independent of this general ground of the former inability to make a proper *profert* of the deed at law, there was another satisfactory ground for the interference of a court of equity. It is, that no other court could furnish the same remedy with all the fit limitations

(g) 3 Black. Comm. 431.

(h) *Atkinson v. Leonard*, 3 Bro. C. C. 218; *Bromley v. Holland*, 7 Ves. 19, 20; *East India Co. v. Boddam*, 9 Ves. 464.

(i) *Whitfield v. Fausset*, 1 Ves. Sen. 387; *Read v. Brokman*, 3 T. R. 151.

(k) *Atkinson v. Leonard*, 3 Bro. C. C. 218; *Bromley v. Holland*, 7 Ves. 3; *East India Co. v. Boddam*, 9 Ves. 464.

which may be demanded for the purposes of justice, by granting relief only upon the terms of the party's giving (when proper) a suitable bond of indemnity. Now, a court of law was incompetent to require such a bond of indemnity as a part of its judgments, although it sometimes attempted an analogous relief (it is difficult to understand upon what ground), by requiring the previous offer of such an indemnity (*l*). But such an offer might, in many cases, fall far short of the just relief; for, in the intermediate time, there might be a great change in the circumstances of the parties to the bond of indemnity (*m*). In joint bonds, there are still stronger reasons; for the equities may be different between the different defendants (*n*). And, besides, a court of equity, before it would grant relief, would insist that the defendant should have the protection of the oath and affidavit of the plaintiff to the fact of the loss; thus requiring, what is most essential to the interests of justice, that the party should pledge his conscience by his oath, that the instrument was lost (*o*).

§ 84. It has been remarked by Lord Hardwicke, that the loss of a deed is not always a ground to come into a court of equity for relief; for, if there is no more in the case, although the party might be entitled to a discovery of the original existence and validity of the deed, courts of law might afford just relief, since they would admit evidence of the loss and contents of a deed (*p*), just as a court of equity would do (*q*). To enable the party, therefore, in case of a lost deed, to come into equity for relief, he must have established that there was no remedy at all at law, or no remedy which was adequate, and adapted to the circumstances of the case. In the first place, he might come into equity for payment of a lost bond; for in such a case his bill need not have been for a discovery only, but might also be for relief; since the jurisdiction attached, when there was no remedy at law for want of a due profert (*r*). In the next place, he might come into equity when a deed or will of land had been destroyed, or was concealed by the defendant; for then, as the party could not know which alternative was correct, a court of equity would make a decree (which a court of law could not) that the plaintiff should hold and enjoy the land (*s*). So, if a deed concerning land were lost, and the party in possession prayed discovery, and to be established in his possession under it, equity would relieve; for no remedy, in such a case, lay at law (*t*).

(*l*) *Ex parte Greenway*, 6 Ves. 812; *Pierson v. Hutchinson*, 2 Camp. 211; s.c. 6 Esp. 126.

(*m*) *East India Co. v. Boddam*, 9 Ves. 464.

(*n*) *East India Co. v. Boddam*, 9 Ves. 464.

(*o*) *Bromley v. Holland*, 7 Ves. 19, 20.

(*p*) *Doe v. Lewis*, 11 C. B. 1035.

(*q*) *Whitfield v. Fausset*, 1 Ves. Sen. 392, 393.

(*r*) *Williams v. Flight*, 5 Beav. 41.

(*s*) *Dalston v. Coatsworth*, 1 P. Wms. 731; *Williams v. Williams*, 33 Beav. 306.

(*t*) *Walmsley v. Child*, 1 Ves. Sen. 344, 345.

And, where the plaintiff was out of possession, there were cases in which equity would have interfered upon lost or suppressed title-deeds, and would have decreed possession to the plaintiff; but in all such cases there must have been other equities calling for the action of the court. Indeed, the bill must always have had some ground besides the mere loss of a title-deed, or other sealed instrument, to justify a prayer for relief; as, that the loss obstructed the right of the plaintiff at law, or left him exposed to undue perils in the future assertion of such right.

§ 85. By the law merchant, which in this respect was adopted by the Courts of Common law, the payee or holder was required to produce and hand over a negotiable bill or note (*u*) upon payment by the acceptor, and consequently there was no remedy upon a lost bill, even if an indemnity were offered (*x*); nor could the consideration be recovered under the same circumstances (*y*). The common law was subsequently altered in this respect by s. 87 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), a provision which was subsequently repealed and re-enacted in s. 70 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). In respect of all other simple contracts the Court of Chancery might not entertain jurisdiction or decree payment upon the mere fact of loss; for no such supposed inability to recover at law existed in the last-mentioned case as existed for want of a profert of a bond at law. No profert was necessary, and no *oyer* allowed at law of such a note or security; and no recovery could be had at law, upon mere proof of the loss. But, then, a court of law could not, as we have seen, insist upon an indemnity, or at least could not insist upon it in such a form as might operate as a perfect indemnity (*z*). Where a negotiable bill or note had been lost, a court of equity would entertain a bill for relief and payment, upon an offer in the bill to give a proper indemnity under the direction of the court, and not without. And such an offer entitled the court to require an indemnity, not strictly attainable at law, and founded a just jurisdiction (*a*). Courts of common law allowed an action to be maintained upon bills or notes proved to have been destroyed, and consequently there existed no corresponding necessity for an equitable jurisdiction to enable the money to be recovered (*b*).

§ 86. In the cases which we have been considering, the lost note, or other security, was negotiable. And, according to the authorities, this circumstance is most material; for otherwise it would seem, that no indemnity would be necessary (*c*), and consequently no relief could

(*u*) *Wain v. Bailey*, 10 A. & E. 616.

(*x*) *Hansard v. Robinson*, 7 B. & C. 90; *Ramuz v. Clay*, 1 Ex. 167.

(*y*) *Crowe v. Clay*, 9 Ex. 604.

(*z*) See *Hansard v. Robinson*, 7 B. & C. 90.

(*a*) *Macartney v. Graham*, 2 Sim. 796.

(*b*) *Wright v. Lord Maidstone*, 1 K. & J. 701.

(*c*) *Wain v. Bailey*, 10 A. & E. 616.

be had in equity (*d*). The propriety of this exception has been somewhat doubted; for the party is entitled, upon payment of such a note or security, to have it delivered up to him, as voucher of the payment and extinguishment of it; and it may have been assigned, in equity, or under the provisions of s. 25, sub-s. 6 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), to a third person. And although, in such a case, the assignee would be affected by all the equities between the original parties, yet the promisor may not always, after a great length of time, be able to establish those equities by competent proof; and, at all events, he may be put to serious expense and trouble, to establish his exoneration from the charge. The jurisdiction of courts of equity, under such circumstances, seems perfectly within the principles on which such courts ordinarily proceed to grant relief, not only in cases of absolute loss, but of impending or probable mischief or inconvenience. And a bond of indemnity, under such circumstances, is but a just security to the promisor against the vexation and accumulated expenses of a suit (*e*).

§ 87. It is upon grounds somewhat similar, that courts of equity often interfere, where the party, from the long possession or exercise of a right over property, may fairly be presumed to have had a legal title to it, and yet has lost the legal evidence of it, or is now unable to produce it. Under such circumstances, equity acts upon the presumption, arising from such possession, as equivalent to complete proof of the legal right. Thus, where a rent has been received and paid for a long time, equity will enforce the payment, although no deed can be produced to sustain the claim; or the precise lands, out of which it is payable, cannot, from confusion of boundaries, or other accident, be now ascertained (*f*).

§ 88. In the cases of supposed lost instruments, where relief was sought, it was indispensable, that the loss, if not admitted by the answer of the defendant, should be established by competent and satisfactory proofs (*g*). For the very foundation of the suit in equity rested upon this most material fact. If, therefore, the plaintiff should fail, at the hearing, to establish the loss of the instrument, or the defendant should overcome the plaintiff's proofs by countervailing testimony of its existence, the suit would be dismissed, and the plaintiff remitted to the legal forum. But if the loss were sufficiently established, when it was denied by the defendant's answer, the plaintiff would be entitled to relief, although he might have other evidence, competent and sufficient to establish the existence and contents of

(*d*) See *Wright v. Lord Maidstone*, 1 K. & J. 701.

(*e*) See *Hansard v. Robinson*, 7 B. & C. 90; *East India Co. v. Boddam*, 9 Ves. 468, 469; *Davies v. Dodd*, 4 Price, 176; Story on Bills, § 106 to 116, 243 to 245, 445.

(*f*) *Duke of Leeds v. New Radnor*, 2 Bro. C. C. 338, 518; *Searle v. Cooke*, 43 Ch. D. 519.

(*g*) *East India Co. v. Boddam*, 9 Ves. 466; *Green v. Bailey*, 15 Sim. 542; *Bell v. Alexander*, 6 Hare, 543.

the instrument, of which he might have availed himself in a court of law. For if the jurisdiction once attached by the loss of the instrument, a court of equity would not drive the party to the hazard of a trial at law, when the case was fit for its own interposition, and final action upon a claim to sift the conscience of the party by a discovery. Under the practice introduced by s. 24, sub-s. 7 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the jurisdiction could be exercised in any division in which a lost or destroyed instrument was the foundation of the action (*h*).

§ 89. We have thus far been considering cases of accident, founded upon lost instruments. But there are many other cases of accident, where courts of equity will grant relief. One of the earliest cases in which they were accustomed to interfere, was, where by accident a bond had not been paid at the appointed day, and it was subsequently sued; or where a part only had been paid at the day (*i*). This jurisdiction was afterwards greatly enlarged in its operation, and applied to all cases, where relief was sought against the penalty of a bond, upon the ground that it was unjust for the party to avail himself of the penalty, when an offer of full indemnity is tendered. The same principle governs in the case of mortgages, where courts of equity constantly allow a redemption, although there is a forfeiture at law (*k*). The learned author here added the expression of his opinion that, as a general proposition, it was correct to say, "where an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his control, or from his own acts done in entire good faith, and in the performance of a supposed duty, without negligence, courts of equity will interfere to grant him relief." The cases cited do not warrant any pronouncement of this character, and there is ample authority negating any such proposition. Where a personal representative paid a simple contract debt in ignorance and without notice of the existence of a judgment debt, it was regarded as a devastavit in a court of equity as well as in a court of law (*l*). If a person "in entire good faith, and in the performance of a supposed duty" of maintaining the rights of himself or of the public, committed a trespass, not only would a court of equity not "interfere to grant him relief," but it would grant an injunction to restrain him from repeating the tortious act (*m*). There is a statutory power to order the return of a portion of the premium in the event of the bankruptcy of the master under section 34 of the Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), but there is no other authority to do so except in the event of misconduct on the part of the master, and the existence of an exceptional jurisdiction where the

(*h*) See *King v. Zimmerman*, L R., 6 C. P. 466.

(*i*) *Sloman v. Walter*, 1 Bro. C. C. 418.

(*k*) *Seton v. Slade*, 7 Ves. 273, 274; *post*, § 1313, 1314, 1316.

(*l*) *Fuller v. Redman* (No. 1), 26 Beav. 600.

(*m*) *Robertson v. Hartopp*, 43 Ch. D. 484; *Bourke v. Davis*, 44 Ch. D. 110.

master is a solicitor, and consequently an officer of the court, has been disclaimed (o). So the right to a return of the premium paid upon entering into partnership in the case of dissolution before the agreed termination, depended upon the misconduct of the recipient, or unfair dealing on his part, and this is in substance adopted in the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 40 (p). So where a gift is liable to be defeated by the terms of a gift over there can be no relief where the legatee fails to perform the condition, although he is ignorant of its terms, unless his conduct has been induced by the fraud or overreaching of the party entitled under the terms of the gift over (q).

§ 94. In the execution of mere powers, it has been said that a court of equity will interpose, and grant relief on account of accident, as well as of mistake. And this seems regularly true, where, by accident, there is a defective execution of the power (r). And it is now settled that a non-execution of a power will not be aided unless the execution has been prevented by fraud (s).

§ 95. In regard to the defective execution of powers, resulting either from accident or mistake, or both, and also in regard to agreements to execute powers (which may generally be deemed a species of defective execution), courts of equity do not in all cases interfere and grant relief; but grant it only in favour of persons, in a moral sense entitled to the same, and viewed with peculiar favour, and where there are no opposing equities on the other side. Without undertaking to enumerate all the qualifications of doctrine belonging to this intricate subject, it may be stated; that courts of equity, in cases of defective execution of powers, will (unless there be some countervailing quality) interpose, and grant relief in favour of purchasers, creditors, a wife, a legitimate child, and a charity; but not in favour of the donee of the power, or a husband, or grandchildren, or remote relations, or strangers (including an illegitimate child) generally (t).

§ 96. But in cases of defective execution of powers we are carefully to distinguish between powers which are created by private parties, and those which are specially created by statute; as, for instance, powers of tenants for life or in tail to make leases. Whatever formalities are required by the statute must be punctually complied with, where they constitute the apparent policy and object

(o) *Craven v. Stubbins*, 34 L. J. Ch. 126; *Ferns v. Carr*, 28 Ch. D. 409.

(p) *Atwood v. Maude*, L. R. 3 Ch. 369; *Wilson v. Johnstone*, L. R. 16 Eq. 606; *Belfield v. Bourne*, [1894] 1 Ch. 521.

(q) *In re Lewis*; *Lewis v. Lewis*, [1904] 2 Ch. 656.

(r) *Sugd. Powers*, 530, 8th ed.

(s) *Tollet v. Tollet*, 2 P. Wms. 489; *In re Weekes' Settlement*, [1897] 1 Ch. 289. See *Sugd. Powers*, 574, 575, 8th ed.

(t) *Sugd. Powers*, 530, 8th ed.

of the statute (*u*). In *Shannon v. Bradstreet* (*x*), Lord Redesdale held that a defective appointment of a tenant for life under a power of leasing would be aided in equity as against the remainderman. This principle has been adopted and extended by the 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17, whereby, in the case of leases granted in exercise of powers (including statutory powers), the lease may be validated in favour of lessee, and also of reversioners, notwithstanding the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power (*y*).

§ 97. But as to the defects which may be remedied, they may generally be said to be any which are not of the very essence or substance of the power. Thus, a defect by executing the power by *will*, when it is required to be by a deed, or other instrument, *inter vivos*, will be aided (*z*). So, the want of a seal, or of witnesses, or of both (*a*), and defects in the limitations of the property, estate, or interest (*b*), will be aided. And, perhaps, the same rule will apply to defective executions of powers by *femes covert*. But equity will not aid defects which are of the very essence or substance of the power; as, for instance, if the power be executed without the consent of parties who are required to consent to it (*c*). So, if it be required to be executed by *will*, and it is executed by an irrevocable and absolute *deed*; for this is apparently contrary to the settler's intention, a will being always revocable during the life of the testator; whereas, a deed would not be revocable unless expressly so stated in it (*d*).

§ 98. But a class of cases more common in their occurrence, as well as more extensive in their operation, will be found, where trusts, or powers in the nature of trusts, are required to be executed by the trustee in favour of particular persons, and they fail of being so executed by casualty or accident. In all such cases equity will interpose, and grant suitable relief. Thus, for instance, if a testator should, by his will, devise certain estates to A., with directions, that A. should, at his death, distribute the same among his children and relations as he should choose, and A. should die without making such a distribution, a court of equity would interfere, and make a suitable distribution; because it is not given to the devisee as a mere power, but as a trust and duty which he ought to fulfil; and his omission so to do by accident, or design, ought not to disappoint the objects of the bounty.

(*u*) *Earl of Darlington v. Pulteney*, Cowp. 267; *In re Kirwan's Trusts*, 25 Ch. D. 373; *In re Barnett*; *Daves v. Ixer*, [1908] 1 Ch. 402.

(*x*) 1 Sch. & L. 52.

(*y*) *Exp. Cooper*, *In re L. & N. W. Ry.*, 34 L. J. Ch. 373.

(*z*) *Tollet v. Tollet*, 2 P. Wms. 489.

(*a*) *Kennard v. Kennard*, L. R. 8 Ch. 227.

(*b*) *Daniel v. Arkwright*, 2 H. & M. 95.

(*c*) *Sympson v. Hornsby*, Prec. Ch. 452.

(*d*) *In re Jackson's Will*, 13 Ch. D. 189; *In re Flower*; *Edmonds v. Edmonds*, 55 L. J. Ch. 200.

It would be very different if the case were of a mere naked power, and not a power coupled with a trust (*e*).

§ 99. Another class of cases is, where a testator cancels a former will upon the presumption that a later will made by him is duly executed when it is not. In such a case it has been decided that the former will shall be set up against the heir in a court of equity, and the devisee be relieved there, upon the ground of accident (*f*). But it is doubtful if this principle would be followed at the present day, at any rate to the full extent (*g*).

§ 100. These may suffice, as illustrations of the general doctrine of relief in equity in cases of accident. They all proceed upon the same common foundation, that there is no adequate or complete remedy at law under all the circumstances; that the party has rights which ought to be protected and enforced; or that he will sustain some injury, loss, or detriment, which it would be inequitable to throw upon him.

§ 101. And this leads us, naturally, to the consideration of those cases of accident, in which no relief will be granted by courts of equity. In the first place, in matters of positive contract and obligation, created by the party (for it is different in obligations or duties created by law) (*h*), it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident; or, that he has been in no default; or, that he has been prevented by accident from deriving the full benefit of the contract on his own side (*i*). Thus, if a lessee on a demise covenants to keep the demised estate in repair, he will be bound in equity as well as in law to do so, notwithstanding any inevitable accident or necessity by which the premises are destroyed or injured; as if they are burnt by lightning, or destroyed by public enemies, or by any other accident, or by overwhelming force. The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume the intentional general liability, where he has made no exception (*k*).

§ 102. And the same rule applies in like cases, where there is an express covenant (without any proper exception) to pay rent during the term. It must be paid, notwithstanding the premises are accidentally burnt down during the term. And this is equally true as to the rent, although the tenant has covenanted to repair, except in cases of casualties by fire, and the premises are burnt down by such

(*e*) *Harding v. Glyn*, 1 Atk. 469, and note by Saunders; *Brown v. Higgs*, 4 Ves. 709; 5 Ves. 495; 8 Ves. 561.

(*f*) *Onions v. Tyrer*, 1 P. Will. 343.

(*g*) See *Woodward v. Goulstone*, 11 App. Cas. 469.

(*h*) *Paradine v. Jane*, Aleyn 27. See also Story on Bailments, § 25, 35, 36.

(*i*) *Berrisford v. Done*, 1 Vern. 98; *Paine v. Miller*, 6 Ves. 349; *Rayner v. Preston*, 18 Ch. D. 1.

(*k*) *Pym v. Blackburn*, 3 Ves. 34.

casualty; for, *Expressio unius est exclusio alterius* (l). In all cases of this sort of accidental loss by fire, the rule prevails, *Res perit domino*; and, therefore, the tenant and landlord suffer according to their proportions of interest in the property burnt; the tenant during the term, and the landlord for the residue.

§ 103. And the like doctrine applies to other cases of contract, where the parties stand equally innocent (m). Thus, for instance, if there is a contract for a sale at a price to be fixed by an award of third parties, one of whom dies before the award is made, the contract fails, and equity will not enforce it upon the ground of accident; for there is no equity to substitute a different method of ascertaining the value (n).

§ 104. So, if A. should covenant with B. to convey an estate for two lives in a church lease to B. by a certain day, and one of the lives should afterwards drop in before the day appointed for the conveyance, B. would be compelled to stand by his contract, and to accept the conveyance; for neither party is in any fault; and B., by the contract, took upon himself the risk by not providing for the accident (o). So, if an estate should be sold by A. to B., for a certain sum of money and an annuity, and the agreement should be fair, equity will not grant relief, although the party should die before the payment of any annuity (p).

§ 105. Courts of equity will not grant relief to a party upon the ground of accident where the accident has arisen from his own gross negligence or fault; for in such a case the party has no claim to come into a court of justice to ask to be saved from his own culpable misconduct. And, on this account, in general, a party coming into a court of equity is bound to show that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents (q).

§ 106. In the next place, no relief will be granted on account of accident, where the other party stands upon an equal equity, and is entitled to equal protection. Upon this ground, also, equity will not interfere to give effect to an imperfect will against an innocent heir-at-law; for, as heir, he is entitled to protection, whatever might have been the intent of the testator, unless his title is taken away according to the rules of law.

§ 108. And, generally, against a *bonâ fide* purchaser, for a valuable consideration, without notice, a court of equity will not interfere on the ground of accident; for, in the view of a court of equity, such a purchaser has as high a claim to assistance and protection as any

(l) *Holtzapffell v. Baker*, 18 Ves. 115.

(m) Com. Dig. Chancery, 3 F. 5.

(n) *Milnes v. Gery*, 14 Ves. 400; *Scott v. Avery*, 5 H. L. C. 811.

(o) *White v. Nutt*, 1 P. Wms. 61.

(p) *Mortimer v. Capper*, 1 Bro. C. C. 156; *Kenney v. Wrexham*, 6 Mad. 355.

(q) See *Counter v. Macpherson*, 5 Moo. P. C. 83; *In re Horne*; *Wilson v. Cox Sinclair*, [1905] 1 Ch. 76.

other person can have. Principles of an analogous nature seem to have governed in many of the cases in which the want of a surrender of copyhold has been supplied by courts of equity.

§ 109. Perhaps, upon a general survey of the grounds of equitable jurisdiction in cases of accident, it will be found that they resolve themselves into the following: that the party seeking relief has a clear right, which cannot otherwise be enforced in a suitable manner; or, that he will be subjected to an unjustifiable loss, without any blame or misconduct on his own part; or, that he has a superior equity to the party from whom he seeks the relief.

CHAPTER V.

MISTAKE.

§ 110. WE may next pass to the consideration of the jurisdiction of the courts of equity, founded upon the ground of mistake. This is sometimes the result of accident, in its large sense; but, as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. Mistakes are ordinarily divided into two sorts: mistakes in matter of law, and mistakes in matter of fact.

§ 111. And first, in regard to mistakes in matter of law. It is a well-known maxim, that ignorance of law will not furnish an excuse for any person, either for a breach, or for an omission of duty; *Ignorantia legis neminem excusat*; and this maxim is generally as much respected in equity as in law (*a*), but in matters of purely equitable jurisdiction, the rule is not so strictly applied, for there the line has not been drawn so strictly between mistakes of law and mistakes of fact (*b*). It probably belongs to some of the earliest rudiments of English jurisprudence; and is certainly so old, as to have been long laid up among its settled elements. We find it stated with great clearness and force in the Doctor and Student, where it is affirmed, that every man is bound at his peril to take knowledge what the law of the realm is; as well the law made by statute, as the common law (*c*). The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried (*d*). Indeed, one of the remarkable tendencies of the English common law upon all subjects of a general nature is, to aim at practical good, rather than theoretical perfection; and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business. If, upon the mere ground of ignorance of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance,

(*a*) *Goodman v. Sayers*, 2 J. & W. 263; *Bate v. Hooper*, 5 De G. M. & G. 338; *In re Sharp*; *Rickett v. Rickett*, [1906] 1 Ch. 793.

(*b*) *Dibbs v. Goren*, 11 Beav. 483; *Daniell v. Sinclair*, 6 App. Cas. 181.

(*c*) Doct. & Stud. Dial. 2, ch. 46.

(*d*) *Bilbie v. Lumley*, 2 East 469, 472.

there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs. The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse, than to permit a person to reclaim his property upon the mere pretence, that at the time of parting with it, he was ignorant of the law acting on his title. Mr. Fonblanque has accordingly laid it down as a general proposition, that in courts of equity ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts (*e*). And he is fully borne out by authorities (*f*). The rule is, however, restricted to matters of general law, and not to matters of private right (*g*). The ordinary rule as between litigant parties, that money paid under a mistake of law cannot be recovered, does not apply to a payment made under mistake to the trustee in a bankruptcy liquidator or other officer of the court (*h*).

112. One of the most common cases, put to illustrate the doctrine is, where two are bound by a bond, and the obligee releases one, supposing, by a mistake of law, that the other will remain bound. In such a case the obligee will not be relieved in equity upon the mere ground of his mistake of the law; for there is nothing inequitable in the co-obligor's availing himself of his legal rights, nor of the other obligor's insisting upon his release, if they have both acted *bonâ fide*, and there has been no fraud or imposition on their side to procure the release (*i*). So, where a party had a power of appointment, and executed it absolutely, without introducing a power of revocation, upon a mistake of law, that being a voluntary deed, it was revocable, relief was in like manner denied (*k*). If the power of revocation had been intended to be put into the appointment, and omitted by a mistake in the draft, it would have been a very different matter (*l*).

§ 113. The same principle applies to agreements entered into in good faith, but under a mistake of the law. They are generally held valid and obligatory upon the parties (*m*). Thus, where a clause containing a power of redemption, in a deed granting an annuity, after

(*e*) 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (b); 1 Mad. Ch. Pr. 60; Rep. 364; 1 Ves. 127.

(*f*) *Goodman v. Sayers*, 2 J. & W. 263; *Bate v. Hooper*, 5 De G. M. & G. 338; *In re Sharp*; *Rickett v. Rickett*, [1906] 1 Ch. 793.

(*g*) *Cooper v. Phibbs*, L. R. 2 H. L. 170; and *cf. Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316, with *In re County Life Assurance*, L. R. 5 Ch. 288.

(*h*) *Ex parte Simmonds*, *In re Carniac*, 16 Q. B. D. 308; *In re Brown*; *Dixon v. Brown*, 32 Ch. D. 597; *In re Opera, Limited* (1891), 2 Ch. 154.

(*i*) Com. Dig. Chancery, 3 F. 8; *Harmon v. Cannon*, 4 Vin. Abridg. 387, pl. 3; *Cann v. Cann*, 1 P. Will. 723. And see *Ex parte Gifford*, 6 Ves. 805, as explained in *Kearsley v. Cole*, 16 M. & W. 128.

(*k*) *Worrall v. Jacob*, 3 Meriv. 256.

(*l*) See *Wright v. Goff*, 22 Beav. 207; *Daniel v. Arkwright*, 2 H. & M. 95.

(*m*) *Powell v. Smith*, L. R. 14 Eq. 85.

it had been agreed to, was deliberately excluded by the parties upon a mistake of law, that it would render the contract usurious; the Court of Chancery refused to restore the clause, or to grant relief (*n*). Lord Eldon, in commenting on this case, said that it went upon an undisputable clear principle, that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind that it would be ruinous. And they desired the court to do, not what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation, as if they had been better informed, and consequently had a contrary intention (*o*). So, where a devise was given upon condition that a woman should marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other parties, who afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the court refused any relief, although it was contended, that it was upon a mistake of law. Lord Hardwicke, on that occasion, said: "It is said, they [the parties] might know the fact, and yet not know the consequence of law. But if parties are entering into an agreement, and the very will, out of which the forfeiture arose, is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point; and shall not be relieved on a pretence of being surprised, with such strong circumstances attending it" (*p*).

§ 116. In the preceding section (*q*) it has been stated, that agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held valid and obligatory. The doctrine is laid down in this guarded and qualified manner, because it is not to be disguised, that there are authorities, which are supposed to contradict it, or at least to form exceptions to it. Indeed, in one case, Lord King is reported to have said, that the maxim of law, *Ignorantia juris non excusat*, was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes; but that it did not hold in civil cases (*r*). This broad statement is utterly irreconcilable with the well-established doctrine both of courts of law and courts of equity, and the decision itself has been overruled long since (*s*). The general rule certainly is that a mistake of the law is not a ground for reforming a deed, founded on such a mistake. And whatever exceptions there may be to this rule, they are not only few in number, but they will be found

(*n*) *Irnham v. Child*, 1 Bro. C. C. 92.

(*o*) *Marquis of Townsend v. Stangroom*, 6 Ves. 332.

(*p*) *Pullen v. Ready*, 2 Atk. 587, 591.

(*q*) *Ante*, § 113.

(*r*) *Lansdowne v. Lansdowne*, Moseley 364; s.c. 2 Jac. & W. 205.

(*s*) *Stewart v. Stewart*, 9 Cl. & F. 911.

to have something peculiar in their character, and to involve other elements of decisions.

§ 117. In illustration of this remark, we may refer to a case, commonly cited as an exception to the general rule. In that case, the daughter of a freeman of London had a legacy of £10,000, left by her father's will upon condition that she should release her orphanage share; and, after her father's death, she accepted the legacy, and executed the release. Upon a bill, afterwards filed by her against her brother, who was the executor, the release was set aside, and she was restored to her orphanage share, which amounted to £40,000. Lord Chancellor Talbot, in making the decree, admitted that there was no fraud in her brother, who had told her that she was entitled to her election to take an account of her father's personal estate, and to claim her orphanage share; but she chose to accept the legacy. His lordship said: "It is true, it appears, the son [the defendant] did inform the daughter, that she was bound either to waive the legacy given by the father, or release her right to the custom. And, so far, she might know that it was in her power to accept either the legacy or orphanage part. But I hardly think she knew she was entitled to have an account taken of the personal estate of her father; and first to know, what her orphanage part did amount to; and that when she should be fully apprised of this, then, and not till then, she was to make her election, which very much alters the case. For, probably, she would not have elected to accept her legacy, had she known, or been informed, what her orphanage part amounted unto, before she waived it and accepted the legacy" (t).

§ 118. It is apparent, from this language, that the decision of his lordship rested upon mixed considerations, and not exclusively upon mere mistake or ignorance of the law by the daughter. There was no fraud in her brother; but it is clear that she relied upon her brother for knowledge of her rights and duties in point of law; and he, however innocently, omitted to state some most material legal considerations, affecting her rights and duty. She acted under this misplaced confidence, and was misled by it; which of itself constituted no inconsiderable ground for relief. But a far more weighty reason is, that she acted under ignorance of facts; for she neither knew nor had any means of knowing what her orphanage share was when she made her election. It was, therefore, a clear case of surprise in matters of fact, as well as of law. No ultimate decision was made in the case, it being compromised by the parties.

§ 119. The case of *Evans v. Llewellyn* (u) is exclusively put in the decree upon the ground of surprise, "the conveyance having been obtained and executed by the plaintiffs improvidently." It was

(t) *Pusey v. Desbouvrie*, 3 P. Will. 315.

(u) 2 Bro. C. C. 150; 1 Cox 333.

admitted that there was no sufficient proof of fraud or imposition practised upon the plaintiff (though the facts might well lead to some doubt on that point); and the plaintiff was certainly not ignorant of any of the facts which respected his rights. The Master of the Rolls (Sir Lloyd Kenyon, afterwards Lord Kenyon) said: "The party was taken by surprise. He had not sufficient time to act with caution; and, therefore, though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation. I am of opinion that the party was not competent to protect himself; and therefore this court is bound to afford him such protection; and therefore these deeds ought to be set aside, as *improvidently* obtained. If the plaintiff had, in fact, gone back, I should have rescinded the transaction" (x).

§ 120. The most general class of cases relied on as exceptions to the rule is that class where the party has acted under a misconception, or ignorance of his title to the property, respecting which some agreement has been made, or conveyance executed. So far as ignorance in point of fact of any title in the party is an ingredient in any of these cases, they fall under a very different consideration (y). But so far as the party, knowing all the facts, has acted upon a mistake of the law, applicable to his title, they are proper to be discussed in this place. Upon a close survey many, although not all, of the cases, in the latter predicament, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise, which equity uniformly regards as a just foundation for relief (z).

§ 121. It has been laid down, as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake. But, where a doubtful question arises, such as a question respecting the true construction of a will, a different rule prevails; and a compromise fairly entered into, with due deliberation, will be upheld in a court of equity, as reasonable in itself, to terminate the differences by dividing the stake, and as supported by principles of public policy (a).

(x) 1 Cox 340, 341. *S. P. Fry v. Lane*, 40 Ch. D. 312; *James v. Kerr*, 40 Ch. D. 449.

(y) See *Ramsden v. Hylton*, 2 Ves. Sen. 304; *Cann v. Cann*, 1 P. Will. 727; *Farewell v. Coker*, cited 2 Meriv. 269; *McCarthy v. Decaix*, 2 Russ. & Myl. 614. See also *Cocking v. Pratt*, 1 Ves. Sen. 400.

(z) See *Willan v. Willan*, 16 Ves. 82.

(a) *Naylor v. Winch*, 1 Sim. & St. 555. See *Stapilton v. Stapilton*, 1 Atk. 2; *Dunnage v. White*, 1 Swanst. 137; *Gordon v. Gordon*, 3 Swanst. 400; *Smith v. Pincombe*, 3 Mac. & G. 653.

§ 122. In regard to the first proposition, the terms in which it is expressed have the material qualification, that the party has, upon plain and settled principles of law, a clear title, and yet is in gross ignorance that he possesses any title whatsoever. Thus, if the eldest son, who is heir-at-law of all the undisposed of fee-simple estates of his ancestor, should, in gross ignorance of the law, knowing, however, that he was the eldest son, agree to divide the estates with a younger brother; such an agreement, executed or unexecuted, would be held, in a court of equity, invalid, and relief would be accordingly granted. In a case thus strongly put, there may be ingredients, which would give a colouring to the case, independent of the mere ignorance of the law. If the younger son were not equally ignorant, there would be much ground to suspect fraud, imposition, misrepresentation, or undue influence on his part (b). And if he were equally ignorant, the case would exhibit such a gross mistake of rights, as would lead to the conclusion of such great mental imbecility, or surprise, or blind and credulous confidence, on the part of the eldest son, as might fairly entitle him to the protection of a court of equity upon general principles. Indeed, where the party acts upon the misapprehension that he has no title at all in the property, it seems to involve in some measure a mistake of fact; that is, of the fact of ownership, arising from a mistake of law. A party can hardly be said to intend to part with a right or title, of whose existence he is wholly ignorant; and if he does not so intend, a court of equity will, in ordinary cases, relieve him from the legal effect of instruments which surrender such unsuspected right or title (c).

§ 124. In *Bingham v. Bingham* (d), there was a devise by A. to his eldest son and heir B., in fee tail, limiting the reversion to his own right heirs. B. left no issue, and devised the estate to the plaintiff. The defendant had brought an ejectment for the estate under the will; and the plaintiff purchased the estate of the defendant for £80, under a mistake of law, that the devise to him, by B., could not convey the fee. Having paid the purchase-money, he now brought his bill to have it refunded, alleging in the bill that he was ignorant of the law, and persuaded by the defendant and his scrivener and conveyancer, that B. had no power to make the devise. The Master of the Rolls, sitting for Lord Hardwicke, granted the relief, saying, that, though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the court was warranted to relieve against. This case has been the subject of controversy as to the actual ground of the decision. The report itself, and Lord Cottenham, referred it to the ground of mistake (e), as did

(b) *Leonard v. Leonard*, 2 Ball & B. 182.

(c) *Ramsden v. Hylton*, 2 Ves. Sen. 304; *Bullock v. Downes*, 9 H. L. C. 1.

(d) 1 Ves. Sen. 126; Belt's Sup. 79.

(e) *Stewart v. Stewart*, 6 Cl. & F. at p. 968.

Lord Cranworth (f). It may also be referred to the ground of fraud (g), as defined in the courts of equity.

§ 124a. *Bingham v. Bingham* was expressly approved and followed in *Cooper v. Phibbs* (h), decided by the House of Lords in 1867. The facts were as follows:—The petitioner agreed to become tenant to the respondent Phibbs of a salmon fishery for three years, but he afterwards discovered that he was himself the owner of the salmon fishery. He claimed a declaration that the agreement was consequently void, as being made under mistake, and it was held by the House of Lords that he was entitled to the declaration prayed for. It should be observed that there was an additional element in the case, from the fact that the petitioner's uncle, for whose daughters Phibbs was trustee, had told him that the salmon fishery belonged to him, *i.e.*, the uncle.

§ 126. The distinction between cases of mistake of a plain and settled principle of law, and cases of mistake of a principle of law, not plain to persons generally, but which is yet constructively certain, as a foundation of title, is not of itself very intelligible, or, practically speaking, very easy of application, considered as an independent element of decision. In contemplation of law, all its rules and principles are deemed certain, although they have not, as yet, been recognised by public adjudications. This doctrine proceeds upon the theoretical ground, that *Id certum est quod certum reddi potest*; and that decisions do not make the law, but only promulgate it. Besides; what are to be deemed plain and settled principles? Are they such as have been long and uniformly established by adjudications only? Or is a single decision sufficient? What degree of clearness constitutes the line of demarcation? If there have been decisions different ways at different times, which is to prevail? If a majority of the profession hold one doctrine, and a minority another, is the rule to be deemed doubtful, or is it to be deemed certain?

§ 127. Take the case commonly put on this head, of the construction of a will. Every person is presumed to know the law; and though opinions may differ upon the construction of the will before an adjudication is made; yet, when it is made, it is supposed always to have been certain. It may have been a question at the bar, whether a devise was an estate for life, or in tail, or in fee simple. But when the court has once decided it to be the one or the other, the title is always supposed to have been fixed and certain in the party from the beginning. It will furnish a sufficient title to maintain a bill for the specific performance of a contract of sale of that title (i).

(f) *Cooper v. Phibbs*, L. R. 2 H. L., at p. 164.

(g) *Hitchcock v. Giddings*, Dan. 1, s.c. 4 Price, 135.

(h) L. R. 2 H. L. 150. See also *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223; *Daniell v. Sinclair*, 6 App. Cas. 181.

(i) *Beidley v. Carter*, L. R. 4 Ch. 230; *Bell v. Holtby*, L. R. 15 Eq. 178; *Osborne to Rowlatt*, 13 Ch. D. 774.

§ 128. Where there is a plain and established doctrine on the subject, so generally known, and of such constant occurrence, as to be understood by the community at large as a rule of property, such as the common canons of descent; there, a mistake in ignorance of the law, and of title founded on it, may well give rise to a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused. But in such cases the mistake of the law is not the foundation of the relief; but it is the medium of proof to establish some other proper ground of relief (*k*).

§ 129. Lord Eldon, in a case of a family agreement, suggested that there might be a distinction between cases, where there is a doubt raised between the parties as to their rights, and a compromise made upon the footing of that doubt, and cases, where the parties act upon a supposition of right in one of the parties without a doubt upon it, under a mistake of law. The former might be held obligatory, when the latter ought not to be (*l*). But his lordship admitted that the doctrine attributed to Lord Macclesfield was otherwise, denying the distinction, and giving equal validity to agreements entered into upon a supposition of a right, and of a doubtful right. And in a subsequent case Lord Eldon based the validity of a compromise upon the fact that "the parties dealt with equal knowledge of the subject," by which word he seems to have meant circumstances (*m*).

§ 130. There may be a solid ground for a distinction between cases, where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt or controversy or litigation between parties as to their respective rights. In the former cases (as has been already suggested) the party seems to labour in some sort under a mistake of fact as well as of law. He supposes, as a matter of fact, that he has no title, and that the other party has a title to the property. As parties can only be treated as dealing with ascertained specific questions (*n*), an intention cannot be imputed to him to release or surrender his title, if the act or agreement proceeds upon the supposition that he has none. Lord Macclesfield is reported to have said, that if the party releasing is ignorant of his right to the estate, or if his right is concealed from him by the person to whom the release is made, there would be good reasons for setting aside the release (*o*).

§ 131. The whole doctrine of the validity of compromises of

(*k*) See *Sturge v. Sturge*, 12 Beav. 229; *Curson v. Bellworthy*, 3 H. L. C. 742; *Fry v. Lane*, 40 Ch. D. 312.

(*l*) *Stockley v. Stockley*, 1 V. & B. 31.

(*m*) *Hotchis v. Dickson*, 2 Bligh., at p. 348. See also *Bellamy v. Sabine*, 2 Phill. 425; *Cloutte v. Storey*, 1911, 1 Ch. 18.

(*n*) *Cloutte v. Storey*, [1911] 1 Ch. 18.

(*o*) *Cann v. Cann*, 1 P. Will. 727.

doubtful rights rests on this foundation (*p*). If such compromises are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or the other, and there would be an end of compromises, if they might be overthrown upon any subsequent ascertainment of rights contrary thereto (*q*). If, therefore, a compromise of a doubtful right is fairly made between parties, its validity cannot depend upon any future adjudication of that right (*r*). And where compromises of this sort are fairly entered into, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result (*s*). But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of a matter of fact or of law (*t*). It has been emphatically said, that no man can doubt that the Court of Chancery will never hold parties, acting upon their rights, to be bound, unless they act with full knowledge of all the doubts and difficulties that do arise. But if parties will, with full knowledge, act upon them, though it turns out that one gains an advantage from a mistake in point of law, yet if the agreement was reasonable and fair at the time, it shall be binding (*u*). And transactions are not, in the eye of a court of equity, to be treated as binding even as family arrangements, where the doubts existing, as to the rights alleged to be compromised, are not presented to the mind of the party interested (*x*).

§ 132. There are cases of family compromises, where, upon principles of policy, for the honour or peace of families, the doctrine sustaining compromises has been carried further. And it has been truly remarked, that in such family arrangements the Court of Chancery has administered an equity, which is not applied to agreements generally (*y*). Such compromises, fairly and reasonably made, to save the honour of a family, as in case of suspected illegitimacy, to prevent family disputes and family forfeitures, are upheld with a strong hand; and are binding, when in cases between mere strangers the like agreements would not be enforced (*z*). Thus, it has been

(*p*) See the dictum of Lord Hardwicke, in *Brown v. Pring*, 1 Ves. 407, 408, as to compromises made by parties, with their eyes open and rightly informed.

(*q*) *Cann v. Cann*, 1 P. Will. 727; *Stapilton v. Stapilton*, 1 Atk. 10; *Naylor v. Winch*, 1 Sim. & Stu. 555; *Goodman v. Sayers*, 2 Jac. & Walk. 263. See *Neale v. Neale*, 1 Keen, 672.

(*r*) *Lucy's Case*, 4 De G. M. & G. 356; *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266.

(*s*) *Lucy's Case*, 4 De G. M. & G. 356; *Lord Bellhaven's Case*, 3 De G. J. & S. 41; *Dixon v. Evans*, L. R. 5 H. L. 606.

(*t*) *Gordon v. Gordon*, 3 Swanst. 400; *Smith v. Pincombe*, 3 Mac. & G. 653.

(*u*) *Gibbons v. Caunt*, 4 Ves. 849.

(*v*) *Lawton v. Campion*, 18 Beav. 87.

(*y*) *Stockley v. Stockley*, 1 V. & B. 29; *Bellamy v. Sabine*, 2 Phill. 425.

(*z*) *Stapilton v. Stapilton*, 1 Atk. 10; *Persse v. Persse*, 7 Cl. & F. 279.

said, that if, on the death of a person, seised in fee, a dispute arises, who is heir; and there is room for a rational doubt, as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows, and is informed of, and at length they agree to distribute the property, under the notion that the elder claimant is illegitimate, although it turns out afterwards that he is legitimate; there, the court will not disturb such an arrangement, merely because the fact of legitimacy is subsequently established (a). Yet, in such a case, the party acts under a mistake of fact. In cases of ignorance of title, upon a plain mistake of the law, there seems little room to distinguish between family compromises and others.

§ 133. And where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, there has been manifested a strong disinclination of courts of equity to sustain even family settlements. It was upon this sort of mixed ground that it has been held that a deed executed by the members of a family to determine their interest under the will and partial intestacy of an ancestor, ought not to be enforced. It appeared on the face of the deed, that the parties did not understand their rights, or the nature of the transaction; and that the heir surrendered an unimpeachable title without consideration. Evidence was also given of his gross ignorance, habitual intoxication, and want of professional advice. But there was no sufficient proof of fraud or undue influence; and there had been an acquiescence of five years (b).

§ 134. Cases of surprise, mixed up with a mistake of law, stand upon a ground peculiar to themselves, and independent of the general doctrine. In such cases the agreements or acts are unadvised, and improvident, and without due deliberation; and, therefore, they are held invalid, upon the common principle adopted by courts of equity, to protect those who are unable to protect themselves, and of whom an undue advantage is taken (c). Where the surprise is mutual, there is of course a still stronger ground to interfere; for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts; or have presupposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem, upon general principles, invalid (d). *Non videntur, qui errant, consentire*, is a rule of the civil law (e); and it is founded in common sense and common

(a) *Gordon v. Gordon*, 3 Swanst. 463, 476.

(b) *Dunnage v. White*, 1 Swanst. 137.

(c) *Sturge v. Sturge*, 12 Beav. 229. See *ante*, § 119.

(d) *Mortimer v. Shortall*, 2 Dr. & War. 363; *May v. Platt*, 1900, 1 Ch. 616.

(e) Dig. Lib. 50, tit. 17, f. 116, § 2.

justice. But in its application it is material to distinguish between error in circumstances which do not influence the contract, and error in circumstances which induce the contract.

§ 135. There are also cases of peculiar trust, and confidence, and relation between the parties, which give rise to a qualification of the general doctrine. Thus, where a mortgagor had mortgaged an estate to a mortgagee, who was his attorney, and in settling an account with the latter, he had allowed him a poundage for having received the rents of the estate, in ignorance of the law that a mortgagee was not entitled to such an allowance, which was professionally known to the attorney; it was held that the allowance should be set aside. But the master of the rolls, upon that occasion, put the case upon the peculiar relation between the parties; and the duty of the attorney to have made known the law to his client, the mortgagor. He said that he did not enter into the distinction between allowances in accounts from ignorance of law, and allowances from ignorance of fact; that he did not mean to say that ignorance of law will generally open an account. But that, the parties standing in this relation to each other, he would not hold the mortgagor, acting in ignorance of his rights, to have given a binding assent (*f*).

§ 136. There are, also, some other cases in which relief has been granted in equity, apparently upon the ground of mistake of law. But they will be found, upon examination, rather to be cases of defective execution of the intent of the parties from ignorance of law as to the proper mode of framing the instrument. Thus, where a husband, upon his marriage, entered into a bond to his wife, without the intervention of trustees, to leave her a sum of money if she should survive him; the bond, although released at law by the marriage, was held good as an agreement in equity, entitling the wife to satisfaction out of the husband's assets (*g*). And so, *e contrà*, where a wife before marriage executed a bond to her husband, to convey all her lands to him in fee, it was upheld in favour of the husband, after the marriage, as an agreement defectively executed, to secure to the husband the land as her portion (*h*).

§ 137. We have thus gone over the principal cases which are supposed to contain contradictions of, or exceptions to, the general rule, that ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements or to set aside solemn acts of the parties. Without undertaking to assert that there are none of these cases which are inconsistent with the rule, it may be affirmed that the real exceptions to it are very few, and generally stand upon

(*f*) *Langstaffe v. Fenwick*, 10 Ves. 405; *S. P. Cockburn v. Edwards*, 18 Ch. D. 449.

(*g*) *Acton v. Pearce*, Prec. Ch. 237; *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83; *In re Breton's Estate*, *Breton v. Woolven*, 17 Ch. D. 416.

(*h*) *Cannel v. Buckle*, 2 P. Will. 243.

some very urgent pressure of circumstances. The rule prevails in all cases of compromises of doubtful, and perhaps in all cases of doubted rights, and especially in all cases of family arrangements (*i*). It is relaxed in cases where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, and surprise (*k*).

§ 138. It is a matter of regret that, in the present state of the law, it is not practicable to present, in any more definite form, the doctrine respecting the effect of mistakes of law, or to clear the subject from some obscurities and uncertainties which still surround it. But it may be safely affirmed, upon the highest authority, as a well-established doctrine, that a mere naked mistake of law, unattended with any such special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity; and the present disposition of courts of equity is to narrow rather than to enlarge, the operation of exceptions (*l*).

§ 138a. The jurisdiction exercised by the court as a court of equity is still in the same irritating condition of doubt. In the common law action for money had and received, to which equitable principles were always applied, the party paying might recover against the recipient if the payment were made in ignorance of the facts, notwithstanding means of knowledge existed, or made in forgetfulness of facts (*m*).

§ 139. Where a *bonâ fide* purchaser, for a valuable consideration, without notice, is concerned, equity will not interfere to grant relief in favour of a party, although he has acted in ignorance of his title upon a mistake of law; for in such a case the purchaser has, at least, an equal right to protection with the party labouring under the mistake (*n*). And where the equities are equal, the court withholds itself from any interference between the parties (*o*).

§ 140. In regard to the other class of mistakes, that is, mistakes of fact, there is not so much difficulty. The general rule is, that an act done, or contract made, under a mistake or ignorance of a

(*i*) *Stewart v. Stewart*, 6 Cl. & F. 911; *Persse v. Persse*, 7 Cl. & F. 279.

(*k*) *Stewart v. Stewart*, 6 Cl. & F. 911; *Daniell v. Sinclair*, 6 App. Cas. 181.

(*l*) Lord Cottenham, in his elaborate judgment in *Stewart v. Stewart*, 6 Cl. & F. 694 to 971, critically examined all the leading authorities upon this subject, and arrived at the same conclusion; and his opinion was confirmed by the House of Lords. See also *Great Western Railway v. Cripps*, 5 Hare 91.

(*m*) *Kelly v. Solari*, 6 M. & W. 54.

(*n*) *Ante*, §§ 64 c, 108; *post*, §§ 165, 381, 409, 436.

(*o*) See *Malden v. Menill*, 2 Atk. 8. In the civil law there is much discussion as to the effect of error of law, and no inconsiderable embarrassment exists in stating, in what cases of error in law the party is relieviable, and in what not. It is certain that a wide distinction was made between the operation of errors of law, and errors of fact. The subject is discussed at length. Dig. Lib. 22, tit. 6, f. 2. See also 2 Evans' Pothier on Oblig. Appendix, No. xviii. pp. 408 to 447; Ayliffe, Pand. B. 2, tit. 15; 1 Domat, B. 1, tit. 8, § 1.

material fact, is voidable and relievable in equity. The ground of this distinction between ignorance of law and ignorance of fact seems to be, that, as every man of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports, when he knows all the facts, it is culpable negligence in him to do an act, or to make a contract, and then to set up his ignorance of law as a defence. The general maxim here is, as in other cases, that the law aids those who are vigilant, and not those who slumber over their rights. And this reason is recognised as the foundation of the distinction, as well in the civil law as in equity (*p*). But no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge, and, therefore, an ignorance of facts does not import culpable negligence. The rule applies not only to cases where there has been a studied suppression or concealment of the facts by the other side, which would amount to fraud; but also to many cases of innocent ignorance and mistake on both sides (*q*). So, if a party has *bonâ fide* entirely forgotten the facts, he will be entitled to relief, because, under such circumstances, he acts under the like mistake of the facts, as if he had never known them (*r*). Ignorance of foreign law is deemed to be ignorance of fact, because the court itself does not take judicial notice of the foreign law, which must be proved as a fact (*s*).

§ 141. The rule, as to ignorance or mistake of facts, entitling the party to relief, has this important qualification, that the fact must be material to the act or contract, that is, that it must be essential to its character, and an efficient cause of its concoction. For though there may be an accidental ignorance or mistake of the fact; yet, if the act or contract is not materially affected by it, the party claiming relief will be denied it. This distinction may be easily illustrated by a familiar case. A. buys an estate of B., to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, unknown at the time to both parties, that B. has no title (as if B. were entitled in remainder expectant upon the determination of an estate tail in C., and C. had executed a disentailing assurance): in such a case equity would relieve the purchaser, and rescind the contract (*t*). But, suppose A. were to sell an estate to B., whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact it only contained nineteen

(*p*) See Pothier, Pand. Lib. 22, tit. 6, § 3, n. 4, 5, 6, 7; § 4, n. 10, 11; *Cocking v. Pratt*, 1 Ves. Sen. 400.

(*q*) *Att.-Gen. v. Ray*, L. R. 9 Ch. 397; *Scott v. Coulson*, [1903] 2 Ch. 249. The same principle was applied at the common law, *Couturier v. Hastie*, 5 H. L. C. 673.

(*r*) *Lady Hood of Avalon v. Mackinnon*, [1909] 1 Ch. 476.

(*s*) *Leslie v. Bailie*, 2 Y. & C. Ch. 91; *M'Cormick v. Garnett*, 5 De G. M. & G. 278; *Di Sora v. Phillips*, 10 H. L. C. 624.

(*t*) See 1 Evans's Pothier on Oblig. Pt. 1, ch. 1, art. 9, n. 17, 18; *Calverly v. Williams*, 1 Ves. Jun. 210; *Hitchcock v. Giddings*, Dan. 1.

acres and three-fourths of an acre, and the difference would not have varied the purchase in the view of either party; in such a case, the mistake would not be a ground to rescind the contract (*u*). But it is now clearly settled that with a few special exceptions a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of defects either in the title to, or quantity or quality of, the estate, which are not covered by the vendor's covenants, unless he can make out a case of fraud (*x*).

§ 142. In cases of mutual mistake going to the essence of the contract, it is not necessary that there should be any presumption of fraud. On the contrary, equity will often relieve, however innocent the parties may be. Thus, if one person should sell a policy on the life of another to a third party, and the life assured was, in fact, dead, without any knowledge of the fact by either party, a court of equity would relieve the vendor, upon the ground that the purchase and sale proceeded upon the footing that the life was in existence. It constituted, therefore, the very essence and condition of the obligation of their contract (*y*). So, if a person should execute a release to another party upon the supposition, founded in a mistake, that certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside upon the ground of a mistake (*z*).

§ 143. The same principle will apply to all other cases, where the parties mutually bargain for and upon the supposition of an existing right. Thus if a purchaser should buy the interest of the vendor in a remainder in fee, expectant upon an estate tail, and the tenant in tail had at the time, unknown to both parties, barred the estate in remainder, a court of equity would relieve the purchaser, in regard to the contract, purely upon the ground of mistake (*a*).

§ 144. The same principle will apply to cases of purchases, where the parties have been innocently misled under a mutual mistake as to the extent of the thing sold. Thus, if one party thought that he had *bonâ fide* purchased a piece of land, as parcel of an estate, and the other thought he had not sold it, under a mutual mistake of the bargain, that would furnish a ground to set aside the contract; because (as has been said) it is impossible to say, that one shall be forced to give that price for part only, which he intended to give for the whole; or, that the other shall be obliged to sell the whole for what he intended to be the price of part only (*b*). But where by the mutual mistake of vendor and purchaser, as to the duration of a

(*u*) *Okill v. Whittaker*, 1 De G. & Sm. 83; 2 Ph. 338.

(*x*) *Joliffe v. Baker*, 11 Q. B. D. 255; *Palmer v. Johnson*, 12 Q. B. D. 32, *Seddon v. N. Eastern Salt Co.*, [1905] 1 Ch. 326.

(*y*) *Scott v. Coulson*, [1903] 2 Ch. 249. *Colyer v. Clay*, 7 Beav. 188.

(*z*) *Hore v. Becher*, 12 Sim. 465; *Fane v. Fane*, L. R. 20 Eq. 698.

(*a*) *Hitchcock v. Giddings*, Dan. 1, s.c. 4 Price, 135.

(*b*) *Calverly v. Williams*, 1 Ves. Jun. 210; *Peers v. Lambert*, 7 Beav. 546. See *Douglas v. Baynes*, [1908] A. C. 477.

leasehold interest, it was sold for much less than its real value, and the conveyance had been executed, and the purchaser had been in possession some years, the vendor was held entitled to no relief against the representatives of the vendee (c).

§ 145. It is upon the same ground that a court of equity proceeds, where an instrument is so general in its terms, as to release the rights of the party to property, and he was wholly ignorant that he had any title thereto, and it was not within the contemplation of the bargain at the time when it was made. In such cases the court restrains the instrument to the purpose of the bargain, and confines the release to the right intended to be released or extinguished.

§ 146. It is not, however, sufficient in all cases, to give the party relief, that the fact is material; but it must be such as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him; since that would be to encourage culpable negligence (d).

§ 147. Nor is it in every case, where even a material fact is mistaken or unknown without any default of the parties, that a court of equity will interpose. The fact may be unknown to both parties, or it may be known to one party, and unknown to the other. If it is known to one party, and unknown to the other, that will in some cases afford a solid ground for relief; as, for instance, where it operates as a surprise, or a fraud, upon the ignorant party (e). But in all such cases, the ground of relief is, not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them (f). For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other, upon the ground of confidence, or otherwise, there the court will not interfere. Thus, if A., knowing that there is a mine in the land of B., of which he knows that B. is ignorant, should buy the land without disclosing the fact to B., for a price in which the mine is not taken into consideration, B. would not be entitled to relief from the contract, because A., as the buyer, is not obliged, from the nature of the contract, to make the discovery (g). There must always be shown,

(c) *Okill v. Whittaker*, 1 De G. & Sm. 83; 2 Ph. 338.

(d) *Lindo v. Lindo*, 1 Beav. 496; *L. & S. W. Ry. v. Blackmore*, L. R. 4 H. L. 610; *Turner v. Turner*, 14 Ch. D. 829; *In re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182. And see *Wason v. Wareing*, 15 Beav. 151. The rule of the civil law is the same. Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia obijciatur. Quod enim si omnes in civitate sciant, quod ille solus ignorat? Et recte Labeo definit, scientiam neque curiosissimi neque negligentissimi hominis accipiendam; verum ejus, qui eam rem diligenter inquirendo notam habere possit. Dig. Lib. 22, tit. 6, f. 9, § 2; Pothier, Pand. Lib. 22, tit. 6, § 4, n. 11.

(e) *Garrard v. Frankel*, 30 Beav. 445; *Paget v. Marshall*, 28 Ch. D. 255.

(f) *May v. Platt*, [1900] 1 Ch. 616.

(g) *Dolman v. Nokes*, 22 Beav. 402; *affd.*, 27 L. T. (O.S.) 178; *Coaks v. Boswell*, 11 App. Cas. 232.

either the mistake of both parties, or the mistake of one, with the fraudulent concealment of the other, to justify a court of equity in reforming a contract (*h*).

§ 148. And it is essential, in order to set aside such a transaction, not only that an advantage should be taken; but it must arise from some obligation in the party to make the discovery, not from an obligation in point of morals only, but of legal duty. In such a case the court will not correct the contract, merely because a man of nice morals and honour would not have entered into it. It must fall within some definition of fraud or surprise. For the rules of law must be so drawn, as not to affect the general transactions of mankind, or to require that all persons should, in all respects, be upon the same level as to information, diligence, and means of judgment. Equity as a practical system, although it will not aid immorality, does not affect to enforce mere moral duties. But its policy is to administer relief to the vigilant, and to put all parties upon the exercise of a searching diligence. Where confidence is reposed, or the party is intentionally misled, relief may be granted; but in such a case there is the ingredient of what the law deems a fraud. Cases falling under this predicament will more properly come in review in a subsequent part of this work (*i*).

§ 149. A like principle applies to cases where the means of information are open to both parties; and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic circumstances. In such cases equity will not relieve. Thus, if the vendee is in possession of facts, which will materially enhance the price of a commodity, and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid. It has been justly observed, that it would be difficult to circumscribe the contrary doctrine within proper limits, where the intelligence is equally accessible to both parties. And, where it is not, the same remark applies with the same force, if it is not a case of mutual confidence, or of a designed misleading of the vendor. Thus, if a vendee has private knowledge of a declaration of war, or of a treaty of peace, or of other political arrangements (in respect to which men speculate for themselves), which materially affect the price of commodities, he is not bound to disclose the fact to the vendor at the time of his purchase; but, at least in a legal and equitable sense, he may innocently be silent. For there is no pretence to say, that upon such matters men repose confidence in each other, any more than they do in regard to other matters affecting the rise and fall of markets. The like principle applies to all other cases, where the parties act upon their own

(*h*) *Wright v. Goff*, 22 Beav. 207; *The Metropolitan Counties Society v. Brown*, 26 Beav. 454; *May v. Platt*, [1900] 1 Ch. 616.

(*i*) *Fox v. Mackreth*, 2 Bro. C. C. 420; 2 Cox, 158, 4 Bro. P. C. 258.

judgment in matters mutually open to them. Thus, if an agreement for the composition of a cause is fairly made between parties with their eyes open, a court of equity will not overhaul it, although there has been a great mistake in the exercise of their judgment (*k*).

§ 150. In like manner, where the fact is equally unknown to both parties; or where each has equal and adequate means of information, or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose. For in such cases the equity is deemed equal between the parties; and, when it is so, a court of equity is generally passive, and rarely exerts an active jurisdiction. Thus, where there was a contract by A. to sell to B., for £20, such an allotment, as the commissioners under an enclosure Act should make for him: and neither party at the time knew what the allotment would be, and were equally in the dark as to the value; the contract was held obligatory, although it turned out upon the allotment to be worth £200 (*l*). The like rule will apply to all cases of sale of real estate or personal estate, made in good faith, where material circumstances, affecting the value, are equally unknown to both parties.

§ 151. The general ground upon which all these distinctions proceed, is, that mistake or ignorance of facts in parties, is a proper subject of relief, only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria* (*m*).

§ 152. One of the most common classes of cases, in which relief is sought in equity, on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief; upon the ground, that the written paper ought to be treated as a full and correct expression

(*k*) *Turner v. Green*, [1895] 2 Ch. 205. See *Vernon v. Keys*, 12 East. 632.

(*l*) *Anon.* cited in *Mortimer v. Capper*, 1 Bro. C. C. 158.

(*m*) *Okill v. Whittaker*, 1 De G. & Sm. 83; 2 Ph. 388.

of the intent, until the contrary is established beyond reasonable controversy (*n*).

§ 153. It has, indeed, been said, that where there is a written agreement, the whole sense of the parties is presumed to be comprised therein; that it would be dangerous to make any addition to it in cases where there does not appear to be any fraud in leaving out anything; and that it is against the policy of the law to allow parol evidence to add to, or vary the terms of, such an agreement (*o*). As a general rule, there is certainly much to recommend this doctrine. But however desirable it may be, as a matter of policy, it is very certain, that courts of equity will grant relief upon clear proof of a mistake, although that mistake is to be made out by parol evidence (*p*). Lord Hardwicke, upon an occasion of this sort, said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that, if reduced in writing contrary to the intent of the parties, on proper proof that would be rectified" (*q*). And this doctrine has been recognized upon many other occasions.

§ 153a. In succeeding paragraphs the learned author examined the grounds upon which the jurisdiction of the court of equity to rectify written instruments upon evidence of mistake could be rested. The answer has been since supplied by two eminent judges. "Courts of equity do not rectify contracts"; said James, V.-C., "They may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument. It is impossible for the court to rescind or alter a contract with reference to the terms of the negotiation which preceded it" (*r*). At an earlier date Turner, L.J., said: "In order to induce the court to rectify an instrument upon the ground of mistake, the mistake must be the concurrent mistake of all the parties. . . . I take this to be the rule in the ordinary case of rectifying mistakes in an instrument where it is sought to alter the instrument in any prescribed or definite mode, and for this reason, that in such cases it is necessary to prove not only that there has been a mistake, but also what was intended to be done, in order that the instrument may be set right according to what was so intended, for

(*n*) *Davis v. Symonds*, 1 Cox 404; *Woollam v. Hearn*, 7 Ves. 211; *Fowler v. Fowler*, 2 De G. & J. 250; *May v. Platt*, [1900] 1 Ch. 616; *Beale v. Kyte*, [1907] 1 Ch. 564.

(*o*) *Irnham v. Child*, 1 Bro. C. C. 92, 93.

(*p*) *Mortimer v. Shortall*, 2 Dr. & War. 363; *Tucker v. Bennett*, 38 Ch. D. 1; *Binhote v. Henderson*, [1895] 2 Ch. 202.

(*q*) *Henkle v. Royal Assur. Co.*, 1 Ves. Sen. 314.

(*r*) *Mackenzie v. Coulson*, L. R. 8 Eq. 375.

in such a case, if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument" (s). Now it will be observed that a court of equity did not, any more than did a court of law, admit parol evidence to vary or control a written contract, the evidence went to show that the writing did not express the terms to which the parties had assented. The distinction may be refined, but evidence of a similar character was admissible in courts of the common law (t). At the present day, when in one and the same action a party may sue for rectification of a written instrument and to enforce the instrument as rectified (u), the distinction is liable to be missed.

§ 157. Relief will be granted in cases of written instruments, only where there is a plain mistake, clearly made out by satisfactory proofs (x). It is true that this, in one sense, leaves the rule somewhat loose, as every court is still left free to say what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity incident to the very administration of justice, for, in many cases, judges will differ as to the result and weight of evidence; and, consequently, they may make different decisions upon the same evidence (y). But the qualification is most material, since it cannot fail to operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions (z). The rule does not prevent the court from acting upon the uncontradicted testimony of one party (a), and in the case of a deed poll this course is inevitable (b). The court has judged between the relative values of the testimonies of litigant parties (c), but the general rule has long ceased to be contested at the bar, that the burden of proof is upon the party asserting that a mistake has been in fact committed (d).

§ 158. Many of the cases included under this head come within the Statute of Frauds, as it is commonly called, which requires certain contracts to be in writing. But the rule as to rejecting parol evidence to contradict written agreements is by no means confined to such cases. It stands as a general rule of law, independent of that statute. It is

(s) *Mackay v. Bentley*, 4 De G. F. & J. 286. See *Paget v. Marshall*, 28 Ch. D. 255.

(t) *Awde v. Dixon*, 6 Ex. 869; *Holding v. Elliott*, 5 H. & N. 117; *Rogers v. Hadley*, 2 H. & C. 227.

(u) *Olley v. Fisher*, 34 Ch. D. 367.

(x) *Earl of Bradford v. Earl of Romney*, 30 Beav. 431.

(y) See Lord Eldon's remarks in *Townsend (Marq.) v. Stangroom*, 6 Ves. 333, 334.

(z) *Mortimer v. Shortall*, 2 Dr. & War. 363; *Fowler v. Fowler*, 4 De G. & J. 250; *May v. Plate*, [1900] 1 Ch. 616.

(a) *Hanley v. Pearson*, 13 Ch. D. 545.

(b) *Lady Hood of Avalon v. Mackinnon*, [1909], 1 Ch. 476.

(c) *Beale v. Kyte*, [1907] 1 Ch. 564.

(d) *Wright v. Golf*, 22 Beav. 207.

founded upon the ground that the written instrument furnishes better evidence of the deliberate intention of the parties than any parol proof can supply (e). And the exceptions to the rule, originating in accident and mistake, have been equally applied to written instruments within and without the Statute of Frauds (f).

§ 159. The relief granted by courts of equity, in cases of this character, is not confined to mere executory contracts, by altering and conforming them to the real intent of the parties; but it is extended to solemn instruments, which are made by the parties, in pursuance of such executory or preliminary contracts. And, indeed, if the court acted otherwise, there would be a great defect of justice, and the main evils of the mistake would remain irremediable. Hence, in preliminary contracts for conveyances, settlements, and other solemn instruments, the court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it, as reformed, if no conveyance or other solemn instrument in pursuance of it has been executed (g). And if such conveyance or instrument has been executed, it reforms the latter also, by making it such as the parties originally intended (h).

§ 160. There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memoranda of the agreement. The danger of public mischief or private inconvenience is far less in such cases than it is in cases where parol evidence is admitted. And, accordingly, courts of equity interfere with far less scruple to correct mistakes in the former than in the latter (i). Thus, marriage settlements are often reformed and varied, so as to conform to the previous articles; and conveyances of real estate are in like manner controllable by the terms of the prior written contract (k). Memoranda of a less formal character are also admissible for the same purpose (l). But in all such cases it must be plainly made out that the parties meant, in their final instruments, merely to carry into effect the arrangements designated in the prior contract or articles. For, if the parties are at liberty to vary the original agreement, the circumstances of the case

(e) *Woollam v. Hearn*, 7 Ves. 218.

(f) *Mortimer v. Shortall*, 2 Dr. & War. 363; *Exp. Nat. Prov. Bank of England, In re Boulter*, 4 Ch. D. 241; *Johnson v. Bragge*, [1901] 1 Ch. 28.

(g) *Olley v. Fisher*, 34 Ch. D. 367.

(h) *Duke of Bedford v. Marquis of Abercorn*, 1 Myl. & Cr. 312; *Walker v. Armstrong*, 8 De G. M. & G. 531.

(i) *Mortimer v. Shortall*, 2 Dr. & War. 363; *Wolterbeek v. Barrow*, 23 Beav. 423; *Barrow v. Barrow*, 18 Beav. 529; *Bonhote v. Henderson*, [1895] 1 Ch. 742; affirmed, [1895] 2 Ch. 202.

(k) *Legg v. Goldwire*, Cas. t. Talb. 20; *Bold v. Hutchinson*, 5 De G. M. & G. 558; *Lenty v. Hillas*, 1 De G. & J. 110; *Mignan v. Parry*, 31 Beav. 211; *Cogan v. Duffield*, 2 Ch. D. 558; *Barkshire v. Grubb*, 18 Ch. D. 616.

(l) *Motteux v. London Assurance Company*, 1 Atk. 545; *Baker v. Paine*, 1 Ves. Sen. 456.

lead to the supposition that a new intent has supervened, and there can be no just claim for relief upon the ground of mistake (*m*). The very circumstance, that the final instrument of conveyance or settlement differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract. It is upon a similar ground that courts of equity act in holding that, where there is a written contract, all antecedent propositions, negotiations, and parol interlocutions on the same subject are to be deemed merged in such contract (*n*).

§ 161. In cases of asserted mistake in written contracts, where the mistake is to be established by parol evidence, the question has often been mooted, how far a court of equity ought to be active in granting relief, by a specific performance in favour of the party seeking to reform the contract upon such parol evidence, and to obtain performance of it, when it shall stand reformed. It is admitted that a defendant, against whom a specific performance of a written agreement is sought, may insist, by way of answer, upon the mistake, as a bar to an action; because he may insist upon any matter which shows it to be inequitable to grant such relief. A court of equity is not bound to enforce a written contract; but it may exercise its discretion when a specific performance is sought (*o*). It will not, therefore, interfere to sustain an action for specific performance, when it would be against conscience and justice so to do. On the other hand, it seems equally clear that a party may, as plaintiff, have relief against a written contract, by having the same set aside and cancelled, or modified, whenever it is founded in a mistake common to both parties of material facts, and it would be unconscientious and unjust for the other party to enforce it at law or in equity (*p*). The learned author then adverted to the case where the party plaintiff seeks, not to set aside the agreement, but to enforce it, when it is reformed and varied by the parol evidence. It is now settled that the courts will admit parol evidence to establish a mistake in a written agreement, and then to enforce it, as varied and established by that evidence, if the mistake be common to all parties to the contract so as to permit of rectification, but not further or otherwise (*q*).

(*m*) *Legg v. Goldwire*, Cas. t. Talb. 20; *Cook v. Fryer*, 1 Hare, 498. See *Essery v. Cowlard*, 26 Ch. D. 191; *Bond v. Walford*, 32 Ch. D. 238.

(*n*) *Rich v. Jackson*, 4 Bro. C. C. 513; *Wace v. Bickerton*, 3 De G. & Sm. 751; *Joliffe v. Baker*, 11 Q. B. D. 255.

(*o*) *Clark v. Grant*, 14 Ves. 519; *Clowes v. Higginson*, 1 Ves. & B. 524; *Winch v. Winchester*, 1 Ves. & B. 375; *Watson v. Marston*, 4 De G. M. & G. 230; *Baxendale v. Seale*, 19 Beav. 601; *In re Hare & O'More's Cont.*, [1901] 1 Ch. 93.

(*p*) See *Ball v. Storie*, 1 Sim. & Stu. 210; *Metropolitan, Counties, Soc. v. Brown*, 26 Beav. 454.

(*q*) *Olley v. Fisher*, 34 Ch. D. 367. See *Woollam v. Hearn*, 7 Ves. 211; *May v. Platt*, [1900] 1 Ch. 616.

§ 162. Courts of equity have granted relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. Thus, in cases where there had been a joint loan of money to two or more obligors, and they were by the instrument made jointly liable, but not jointly and severally, the court has reformed the bond, and made it joint and several, upon the presumption, from the nature of the transaction, as in the case of a loan to a partnership, that it was so intended by the parties, and was omitted by want of skill or by mistake (*r*). Sir William Grant, M.R., insisted (*s*) that the presumption was only applicable to partnership cases, but there was a belief in some quarters that every contract for a joint loan was in equity to be deemed, as to the parties borrowing, a joint and several contract, whether the transaction were of a mercantile nature or not. And as regards the liability of partners the mistake has arisen from attempting to evolve a general rule from particular instances, it being now well settled that the liability of partners upon a contract of loan is not necessarily joint and several, but dependent upon the conditions of the transaction, and presumably a joint liability (*t*).

§ 163. But where the inference of a joint original debt or liability was absent, a court of equity would not interfere; for, in such a case, there was no ground to presume any mistake (*u*). This doctrine has been very clearly expounded by Sir William Grant. "When" (says he) "the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, although at law it is only the joint debt of all. But, there, all the partners have had a benefit from the money advanced, or the credit given; and the obligation of all to pay exists, independently of any instrument, by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It is not the bond that first created the liability to pay" (*x*).

§ 164. It is upon the same ground, that a court of equity will not reform a joint bond against a mere surety, so as to make it several against him, upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by him, that it should be several as well as joint (*y*). And

(*r*) *Bishop v. Church*, 2 Ves. Sen. 100, 371; *Sleech's Case*, 1 Meriv. 538, 539; *Sumner v. Powell*, 2 Meriv. 30.

(*s*) See *Sumner v. Powell*, 2 Meriv. at pp. 35, 36. See also *Richardson v. Horton*, 6 Beav. 185.

(*t*) *Kendall v. Hamilton*, 4 App. Cas. 504; *Scarf v. Jardine*, 7 App. Cas. 345.

(*u*) *Richardson v. Horton*, 6 Beav. 185.

(*x*) *Sumner v. Powell*, 2 Meriv., at p. 36.

(*y*) *Sumner v. Powell*, 2 Meriv. 30.

in other cases, where the obligation or covenant is purely matter of arbitrary convention, not growing out of any antecedent liability in all or any of the obligors or covenantors to do what they have undertaken (as, for example, a bond or covenant of indemnity for the acts or debts of third persons), a court of equity will not by implication extend the responsibility from that of a joint to a joint and several undertaking (z). But if there be an express agreement to the effect that an obligation or other contract shall be joint and several, or to any other effect, and it is omitted by mistake in the instrument, a court of equity will, under such circumstances, grant relief as fully against a surety or guarantee, as against the principal party.

§ 165. In all cases of mistake in written instruments, courts of equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them, with notice of the facts (a). As against *bonâ fide* purchasers for a valuable consideration without notice, courts of equity will grant no relief; because they have, at least, an equal equity to the protection of the court (b).

§ 166. The learned author suggested that as equity would grant relief in cases of mistake in written instruments, to prevent manifest injustice and wrong, and to suppress fraud, it would also grant relief and supply defects, where, by mistake, the parties have omitted any acts or circumstances necessary to give due validity and effect to written instruments. Equity would, no doubt, supply defect of circumstances in conveyances, occasioned by mistake, as of livery of seisin in the passing of a freehold, or of a surrender in case of a copyhold, or the like; but to this extent its jurisdiction was limited. It does not seem, for instance, that a court of equity could supply the want of a seal, in order to render an instrument valid as a deed (c), or validate an award made by an arbitrator who, by reason of a prior award, was *functus officio*, although the prior award omitted a material clause (d).

§ 167. The same principle applies to cases where an instrument has been delivered up, or cancelled, under a mistake of the party, and in ignorance of the facts material to the rights derived under it. A court of equity will in such cases grant relief, upon the ground, that the party is conscientiously entitled to enforce such rights; and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity (e). In this the Court of

(z) *Sumner v. Powell*, 2 Meriv. 30, 35, 36; *Richardson v. Horton*, 6 Beav. 186.

(a) *Warrick v. Warrick*, 3 Atk. 293; Com. Dig. Chancery, 2 C. 2; 4 J. 4.

(b) *Warrick v. Warrick*, 3 Atk. 290, 293; *Garrard v. Frankel*, 30 Beav. 445.

(c) *Nat. Prov. Bk. v. Jackson*, 33 Ch. D. 1; *In re Smith, Oswell v. Shephard*, 67 L. J. 64.

(d) *Mordue v. Palmer*, L. R. 6 Ch. 22.

(e) *East India Co. v. Donald*, 9 Ves. 275; *East India Co. v. Neave*, 5 Ves. 173.

Chancery frequently only applied its active remedies to common law rights (f).

§ 168. And, for the same reason, equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument, and the circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner. For, however just in general the rule may be, “quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est” (g); yet that rule shall not prevail to defeat the manifest intent and object of the parties, where it is clearly discernible on the face of the instrument, if the ignorance or blunder or mistake of the parties has caused them to use inappropriate language. Thus, if one in consideration of natural love should execute a feoffment, or a lease and release, or a bargain and sale, it would, notwithstanding the use of the technical words, be held to operate as a covenant to stand seised (h). And the same rule would be applied if, under the like circumstances, instead of the words “bargain and sell,” the words “give and grant,” or “enfeoff, alien, and confirm,” should be used in a deed (i). But here again the courts of common law had abandoned refinements (k).

§ 169. There is also another marked instance of the application of the remedial authority of courts of equity; that is, to the execution of powers. In no case will equity interfere where there has been a non-execution of a power, as contradistinguished from a trust; but if a trust be coupled with a power, there (as we shall presently see) the trust will be enforced, notwithstanding the force of the power does not execute it (l). But, if there be a defective execution, or attempt at execution of a mere power, there equity will interpose, and supply the defect, not universally, indeed, but in favour of parties for whom the person entrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power. Thus, such a defective execution will be aided in favour of persons standing upon a valuable or a meritorious consideration; such as a *bonâ fide* purchaser for a valuable consideration, a creditor, a wife, and a legitimate child (m); unless, indeed, such aid of the defective execution would, under all the circumstances, be inequitable to other persons; or it is repelled by some counter equity. Indeed, if a general power to raise money for any purposes be given, so that the donee of the power may, if he choose, execute it in his own favour, and he should execute it in favour of mere volun-

(f) *Bartlett v. Pentland*, 10 B. & C. 760.

(g) 1 Co. Litt. 147 u.

(h) *Stapilton v. Stapilton*, 1 Atk. 8; *Smith v. Packhurst*, 3 Atk. 136.

(i) *Harrison v. Austin*, 3 Mod. 237.

(k) *Doe d. Davies*, 2 M. & W. 503; *Wilson v. Wilson*, 1 H. L. C. 538.

(l) *Brown v. Higgs*, 8 Ves. 570; *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206; *Burrough v. Philcox*, 5 Myl. & Cr. 73.

(m) *Fothergill v. Fothergill*, 2 Freem. 256, 257; Sugden, Powers, Ch. 11.

teers, there a court of equity will, in favour of creditors, deem the money assets against the volunteers, upon the ground that the donee of the power has an absolute dominion over the power and the property.

§ 170. The reason for this distinction, between the non-execution of a power and the defective execution of it, has been stated with great clearness and precision by Varny, M.R. "The difference" (he said) "is betwixt a non-execution and a defective execution of a power. The latter will always be aided in equity under the circumstances mentioned; it being the duty of every man to pay his debts, and of a husband or father to provide for his wife or child. But this court will not help the non-execution of a power, which is left to the free will and election of the party, whether to execute or not; for which reason equity will not say he shall execute it; or do that for him which he does not think fit to do for himself" (n). Indeed, a court of equity, by acting otherwise in the case of a non-execution of a power, would, in effect, deprive the party of all discretion as to the exercise of it; and would thus overthrow the very intention manifested by the parties in the creation of the power. On the contrary, when the party undertakes to execute a power, but, by mistake, does it imperfectly, equity will interpose to carry his very intention into effect, and that, too, in aid of those who are peculiarly within its protective favour; that is, creditors, purchasers, wives, and children (o).

§ 171. What shall constitute an execution, or preparatory steps or attempts towards the execution of a power, entitling the party to relief in equity on the ground of a defective execution, has been largely and liberally interpreted. It is clear that it is not sufficient that there should be a mere floating and indefinite intention to execute the power, without some steps taken to give it a legal effect. Some steps must be taken, or some acts done, with this sole and definite intention, and be such as are properly referable to the power (p). Lord Mansfield, at one time, contended, that whatever is an equitable, ought to be deemed a legal, execution of a power, because there should be a uniform rule of property; and that, if courts of equity would presume that a strict adherence to the precise form, pointed out in the creation of the power, was not intended,

(n) *Tollett v. Tollett*, 2 P. Will. 490. See also *Crossling v. Crossling*, 2 Cox 396. Sir William Grant, in *Holmes v. Coghill* (7 Ves. 506), and Lord Erskine, in the same case on appeal (12 Ves. 212), have expressed dissatisfaction with this distinction, as not quite consistent with the principles of law or equity, though fully established by authority.

(o) *Moodie v. Reid*, 1 Mad. 516.

(p) *Dowell v. Dew*, 1 Y. & C. Ch. 345; *In re Dyke's Estate*, L. R. 7 Eq. 337. There must be a distinct intention to execute the power. *Garth v. Townsend*, L. R. 7 Eq. 220.

and therefore not necessary, the same rule should prevail at law (*q*). But this doctrine has been overruled. And indeed, courts of equity do not deem the power well executed unless the form is adhered to; but in cases of a meritorious consideration they supply the defect (*r*).

§ 172. And relief will be granted, not only when the defect arises from an informal instrument, not within the scope of the power, but also when the defect arises from the improper execution of the appropriate instrument. All that is necessary is, that the intention to execute the power should clearly appear in writing. Thus, if the donee of a power merely covenant to execute it; or, by his will, desire the remainderman, to create the estate; or enter into a contract not under seal, to execute the power; or by letters promise to grant an estate, which he can execute only by the instrumentality of the power; in all these, and the like cases, equity will supply the defect. And even an answer to a bill of complaint, stating that the party appointed, and intended by a writing in due form to appoint the fund, was deemed to be an execution of the power for this purpose (*s*).

§ 173. The like rule prevails, where the instrument selected is not that prescribed by the power; provided it is not in its own nature repugnant to the true object of the creation of the power. Thus, if the power ought to be executed by a deed, but it is executed by a will, the defective execution will be aided (*t*). But, if the power ought to be executed by a will, and the donee of the power should execute a conveyance of the estate by a deed not containing a power of revocation, the deed will be invalid; because such a conveyance, if it avail to any purpose, must avail to the immediate destruction of the power, since it would no longer be revocable, as a will would be. The intention of the power, in its creation, was to reserve an entire control over its execution, until the moment of the death of the donee; and this intention would be defeated by any other instrument than a will (*u*). An act done, not strictly according to the terms of the power, but consistent with its intent, may be upheld in equity. But an act, which violates the very purpose for which the power was created, and the very control over it which it meant to vest in the donee, is repugnant to it, and cannot be deemed, in any just sense, to be an execution of it (*x*).

§ 174. The Court of Chancery would have interposed formerly to supply a defective execution of a power by will (*y*); but this power is

(*q*) *Darlington v. Pulteney*, Cowp. 267.

(*r*) Sugden on Powers, ch. 11.

(*s*) *Carter v. Carter*, Moseley 365.

(*t*) *Tollett v. Tollett*, 2 P. Will. 489; *Sneyd v. Sneyd*, Amb. 64, Sugden, Powers, 558 n. (II).

(*u*) *Reid v. Shergold*, 10 Ves. 370.

(*x*) See *Bainbridge v. Smith*, 8 Sim. 86; *ante*, § 97. See Wills Act, 1 Vict. c. 26, s. 10.

(*y*) *Wade v. Paget*, 1 Bro. C. C. 363; *Gullan v. Grove*, 26 Beav. 64.

taken away, where the objection is as to form of execution, by section 10 of the Wills Act, 1837 (1 Vict. c. 26) (z). Equity will also, in many cases, grant relief, where, by mistake, a different kind of estate or interest is given from that which is authorised by the power, or where there is an excess of the power (a).

§ 175. In all these cases it is to be understood that the intention and objects of the power are not defeated or put aside; but that they are only attempted by the party to be carried into effect by informal documents. But where there is a defect of substance in the execution of the power, such as the want of co-operation of all the proper parties in the act, there equity will not aid the defect (b).

§ 176. But in all these cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive (c). Thus, equity will not relieve one person, claiming under a voluntary defective conveyance, against another, claiming also under a voluntary conveyance; but will leave the parties to their rights at law (d). For, regularly, equity is remedial to those only who come in upon an actual consideration; and, therefore, there should be some consideration, equitable or otherwise, expressed or implied. But there are excepted cases, even from this rule; for a defective execution has been aided in favour of a volunteer, where a strict compliance with the power has been impossible from circumstances beyond the control of the party; as where the prescribed witnesses could not be found; or where an interested party, having possession of the deed creating the power, has kept it from the sight of the party executing the power, so that he could not ascertain the formalities required.

§ 177. For the same reason equity will not aid the defective execution of a power, to the disinheritation of the heir-at-law. Neither will it do this in favour of creditors, where there are, otherwise, assets sufficient to pay their debts; nor against a purchaser for a valuable consideration without notice. And there are other cases of the defective execution of powers, where equity will not interfere; as, for instance, in regard to powers which are in their own nature statutable, where equity must follow the law, be the consideration ever so meritorious. Thus, the power of a tenant in tail to make leases under a statute, if not executed in the requisite form prescribed by the statute, will not be made available in equity, however meritorious

(z) *In re Barnett, Dawes v. Ixer*, [1908] 1 Ch. 402.

(a) Sugden on Powers, ch. 11 (8th edit.).

(b) *Thackwell v. Gardiner*, 5 De G. & Sm. 58; *Cooper v. Martin*, L. R. 3 Ch. 47; *Phillips v. Cayley*, 43 Ch. D. 222; *In re Lane, Belli v. Lane*, [1908] 2 Ch. 581.

(c) See Sugden on Powers, ch. 11 (8th edit.).

(d) *Moodie v. Reid*, 1 Mad. 516; *Hughes v. Wells*, 9 Ha. 749.

the consideration may be (f). And indeed it may be stated as generally, although not universally true, that the remedial power of courts of equity does not extend to the supplying of any circumstance, for the want of which the legislature has declared the instrument void; for, otherwise, equity would, in effect, defeat the very policy of the legislative enactments (g).

§ 178. Upon one or both of these grounds, either that there is no superior equity, or that it is against the policy of the law, the remedial power of courts of equity did not extend to the case of a defective fine, as against the issue, or of a defective recovery, as against a remainderman; unless, indeed, there was something in the transaction to affect the conscience of the issue, or the remainderman.

§ 179. In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them, when they are apparent on the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for, parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity (h). So far the learned author. But it is quite obvious that he failed, in the foregoing and in the subsequent passages, to emphasize inferentially or in the text that the intention to which the court gives effect is the expressed intention of the testator. The cases which he cited, and the illustrations which he gave, must be referred to the rules of interpretation; *e.g.*, is a gift to a "husband" or "wife" or "widow" of the testatrix, or testator, or other person, conditional upon a valid marriage (i), or where a testator revokes a will stating as his reason that the legatees are dead, which is treated as a conditional revocation (k).

(f) *Darlington v. Pulteney*, Cowp. 267; *Rosswell's case*, 1 Rolle, Ab. 379, pl. 6.

(g) *Curtis v. Perry*, 6 Ves. 739; *Mestaer v. Gillespie*, 11 Ves. 621; *Thompson v. Leake*, 1 Mad. 39; *Thompson v. Smith*, 1 Mad. 395; *Hughes v. Morris*, 2 De G. M. & G. 349; *In re Frieze-Green's Patent*, [1907] A. C. 460.

(h) *Milner v. Milner*, 1 Ves. Sen. 106; *Danvers v. Manning*, 2 Bro. C. C. 18; 1 Cox 203; *Campbell v. French*, 3 Ves. 321.

(i) *Giles v. Giles*, 1 Keen, 685; *Wilkinson v. Jonghin*, L. R. 2 Eq. 319; *In re Boddington*, *Boddington v. Clariat*, 25 Ch. D. 685; *In re Wagstaff*, *Wagstaff v. Jalland*, [1908] 1 Ch. 162.

(k) *Campbell v. French*, 3 Ves. 361.

CHAPTER VI.

ACTUAL OR POSITIVE FRAUD.

§ 184. LET us now pass to another great head of concurrent jurisdiction in equity, that of fraud. And here it may be laid down as a general rule, subject to few exceptions, that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, other courts. It has been already stated, that in a great variety of cases fraud is remediable, and effectually remediable at law (*a*). Nay, in certain cases, such as fraud in obtaining a will, whether of personal estate, or real estate, the proper remedy was exclusively vested in other courts prior to the Judicature Act, 1873; in wills of personal estate, in the Court of Probate (*b*), and in wills of real estates, in the courts of common law (*c*). But there are many cases, in which fraud was utterly irremediable at law; and courts of equity, in relieving against it, often went, not only beyond, but even contrary to, the rules of law (*d*). And with the exception of wills, as above stated, courts of equity may be said to possess a general, and perhaps a universal, concurrent jurisdiction with courts of law in cases of fraud, cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law (*e*).

§ 185. The jurisdiction in matters of fraud is probably coeval with the existence of the Court of Chancery; and it is equally probable, that, in the early history of that court, it was principally exercised in matters of fraud not remediable at law (*f*). Its present active jurisdiction took its rise in a great measure from the abolition of the Court of Star Chamber, in the reign of Charles the First (*g*); in which court the plaintiff was not only relieved, but the defendant was punished for his fraudulent conduct. So that the interposition of chancery before that period was generally unnecessary (*h*).

(*a*) *Ante*, §§ 59, 60; 3 Black. Comm. 431; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*).

(*b*) *Allen v. McPherson*, 1 H. L. C. 191; *Meluish v. Milton*, 3 Ch. D. 27.

(*c*) 3 Black. Comm. 451; *Pemberton v. Pemberton*, 13 Ves. 297.

(*d*) *Cf. Adam v. Newbigging*, 13 App. Cas. 308, with *Derry v. Peek*, 14 App. Cas. 337.

(*e*) *Chesterfield v. Janssen*, 2 Ves. Sen. 125; *Evans v. Bicknell*, 6 Ves. 182; *Hoare v. Brembridge*, L. R. 8 Ch. App. 22.

(*f*) 4 Inst. 84.

(*g*) Stat. 16 Car. I. ch. 10.

(*h*) 1 Mad. Ch. Pr. 89.

§ 186. It is not easy to give a definition of fraud in the extensive signification in which that term is used in courts of equity; and it has been said, that these courts have, very wisely, never laid down, as a general proposition, what shall constitute fraud (*i*). As was pertinently observed by Lord Hardwicke: "Fraud is infinite; and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man's invention would contrive" (*k*). Fraud is even more odious than force; and Cicero has well remarked; "Cum autem duobus modis, id est, aut vi, aut fraude, fiat injuria; fraus, quasi vulpeculæ, vis, leonis videtur. Utrumque homine alienissimum; sed fraus odio digna majore" (*l*). Pothier says that the term *fraud* is applied to every artifice made use of by one person for the purpose of deceiving another. "On appelle Dol toute espèce d'artifice, dont quelqu'un se sert pour tromper un autre" (*m*). Servius, in the Roman law, defined it thus: "Dolum malum machinationem quandam alterius decipiendi causâ, cum aliud simulatur, et aliud agitur." To this definition Labeo justly took exception, because a party might be circumvented by a thing done without simulation; and, on the other hand, without fraud, one thing might be done, and another thing be pretended. And therefore he defined *fraud* to be any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. "Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum, adhibitam." And this is pronounced in the Digest to be the true definition. "Labeonis Definitio vera est" (*n*).

§ 187. This definition is, beyond doubt, sufficiently descriptive of what may be called positive, actual fraud, where there is an intention to commit a cheat or deceit upon another to his injury. But it can hardly be said to include the large class of implied or constructive frauds, which are within the remedial jurisdiction of a court of equity. Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done; but they will also, if acts have by

(*i*) *Mortlock v. Buller*, 10 Ves. 306.

(*k*) Letter to Lord Kaimes, 30 June, 1759, quoted Parke, *Hist. of Chanc.* 508. See also *Lawley v. Hooper*, 3 Atk. 279.

(*l*) *Cic. de Offic. Lib.* 1, ch. 13.

(*m*) 1 Pothier on Oblig. by Evans, Pt. 1, ch. 1, art. 3, n. 28, p. 19.

(*n*) *Dig. Lib.* 4, tit. 3, f. 1, § 2; *ibid. Lib.* 2, tit. 14, f. 7, § 9.

fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done (o).

§ 188. Lord Hardwicke, in a celebrated case (p), after remarking that a court of equity has an undoubted jurisdiction to relieve against every species of fraud, proceeded to give the following enumeration of the different kinds of frauds. First: Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. Secondly: It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice (q). Thirdly: Fraud, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the Court of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance. Fourthly: Fraud, which may be collected and inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. Fifthly: Fraud, in what are called catching bargains with heirs, reversioners, or expectants, in the life of the parents, which indeed seems to fall under one or more of the preceding heads.

§ 189. Fraud, then, being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which courts of equity will grant relief under this head. It will be sufficient, if we here collect some of the more marked classes of cases, in which the principles which regulate the action of courts of equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

§ 190. Before, however, proceeding to these subjects, it may be proper to observe, that courts of equity do not restrict themselves by the same rigid rules as courts of law do, in the investigation of fraud, and in the evidence and proofs required to establish it. It is equally a rule in courts of law and courts of equity that fraud is not to be presumed; but it must be established by proofs. Circumstances of mere suspicion, leading to no certain results, will not, in either of

(o) *Middleton v. Middleton*, 1 Jac. & Walk. 96; *Lord Waltham's case*, cited 11 Ves. 638, 14 Ves. 290.

(p) *Chesterfield v. Janssen*, 2 Ves. Sen. 155.

(q) See *James v. Morgan*, 1 Lev. 111.

these courts, be deemed a sufficient ground to establish fraud (r). On the other hand, neither of these courts insists upon positive and express proofs of fraud; but each deduces them from circumstances justifying inferences (s). But courts of equity will act upon circumstances, as presumptions of fraud, where courts of law would not deem them satisfactory proofs. In other words, courts of equity will grant relief upon the ground of fraud, established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law. It is in this sense that the remark of Lord Hardwicke is to be understood, when he said that "fraud may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be *proved*, not *presumed*" (t). And Lord Eldon has illustrated the same proposition by remarking that a court of equity will, as it ought, in many cases, order an instrument to be delivered up, as unduly obtained, which a jury would not be justified in impeaching by the rules of law, which require fraud to be proved, and are not satisfied, though it may be strongly presumed (u).

§ 191. One of the largest classes of cases, in which courts of equity are accustomed to grant relief, is where there has been a misrepresentation, or *suggestio falsi* (x). It has been said, indeed, to be a very old head of equity, that if a representation is made to another person, going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knows it to be false (y). This statement is correct only so long as a proper meaning is attached to the word "representation," and this many equity practitioners still refuse to do. A liability can be established upon the footing of "making good representations," in cases of fraud, breach of duty, contract including warranty, or estoppel. Unless one or other of these be established there is no equitable remedy (z). To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation; but that it is in a matter of substance, or important to the interests of the other party, and that it actually does mislead him (a). For, if the misrepresentation was of a trifling or immaterial thing; or if the other party did not trust to it, or was

(r) *Trenchard v. Wanley*, 2 P. Will. 166; *Townsend v. Lowfield*, 1 Ves. Sen. 35, 3 Atk. 536; *Cavendish Bentinck v. Fenn*, 12 App. Cas. 652; *Whitehorn, Bros. v. Davison*, [1911] 1 K. B. 463.

(s) *Buller, J., Pasley v. Freeman*, 3 T. R. 60; *Parke, B., Thorn v. Bigland*, 8 Ex 725; *Romilly, M.R., Ship v. Crosskill*, L. R. 10 Eq. 85.

(t) *Chesterfield v. Janssen*, 2 Ves. Sen. 155, 156.

(u) *Fullager v. Clark*, 18 Ves. 483.

(x) *Adam v. Newbigging*, 13 App. Cas. 308.

(y) *Evans v. Bicknell*, 6 Ves. 173, 182.

(z) *Jorden v. Money*, 5 H. L. C. 185; *Low v. Bouverie*, [1891] 3 Ch. 82; *Norton v. Lord Ashburton*, [1914] A. C. 932.

(a) *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Turner v. Harvey*, Jacob 178; *Attwood v. Small*, 6 Cl. & F. 232.

not misled by it; or if it was vague and inconclusive in its own nature; or if it was upon a matter of opinion or fact, equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other; in these and the like cases there is no reason for a court of equity to interfere to grant relief upon the ground of fraud (*b*). But a party is entitled to rely upon a representation made to him, and it is no answer to say that the most obvious inquiry would have elicited the truth (*c*).

§ 192. Where the party intentionally or by design misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a positive fraud in the truest sense of the terms (*d*). There is an evil act with an evil intent; *dolum malum ad circumveniendum*. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions (*e*). The civil law has well expressed this, when it says: “*Dolo malo pactum fit, quotiens, circumscribendi alterius causâ, aliud agitur, et aliud agi simulatur*” (*f*). And again: “*Dolum malum à se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi causâ obscure loquitur, sed etiam, qui insidiosè obscure dissimulat*” (*g*). The case here put falls directly within one of the species of frauds enumerated by Lord Hardwicke; to wit, fraud arising from facts and circumstances of imposition (*h*).

§ 193. Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false (*i*). A party cannot excuse himself by stating that he made the statement in forgetfulness of the true facts, common honesty requiring him to state, “*I do not recollect whether it is so or not*” (*k*). It was thought by some that this principle had been abrogated by a subsequent decision in *Derry v. Peek* (*l*), but there is nothing in that case to warrant this view, for the Judge at the trial found as a fact that there had been no fraud, the defendants’ offence being that they drew a

(*b*) *Trower v. Newcombe*, 3 Meriv. 704; *Attwood v. Small*, 6 Cl. & F. 232.

(*c*) *Redgrave v. Hurd*, 20 Ch. D. 1. See *Wright v. Snowe*, 3 De G. & Sm. 321.

(*d*) *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Attwood v. Small*, 6 Cl. & F. 232; *Scott v. Dixon*, 29 L. J. Ex. 62 n.; *Pidcock v. Bishop*, 3 B. & C. 605.

(*e*) *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Schneider v. Heath*, 5 Camp. 506; *Smith v. Bank of Scotland*, 1 Dow. 272; *Pidcock v. Bishop*, 3 B. & C. 605.

(*f*) Dig. Lib. 2, tit. 14, f. 7, § 9.

(*g*) Dig. Lib. 18, tit. 1, f. 43, § 2; Pothier de Vente, n. 234, 237, 238.

(*h*) *Chesterfield v. Janssen*, 2 Ves. Sen. 155.

(*i*) *Evans v. Edmonds*, 13 C. B. 777; *Reese River Silver Mining Co. v. Smith*, L. R. 4; H. L. 64.

(*k*) *Pulsford v. Richards*, 17 Beav. 94; *Brownlie v. Campbell*, 5 App. Cas. 936.

(*l*) *Derry v. Peek*, 14 App. Cas. 380.

particular conclusion from ascertained facts, and were in truth acting honestly. The decision, however, related to a common law action for damages for deceit, and is only in part applicable to the equitable right in respect of innocent misrepresentation to which totally different considerations apply (*m*). It does not appear, therefore, that an action may not be maintained for equitable relief where a party has innocently misrepresented a material fact by mistake (*n*). An innocent party may be made liable for the fraudulent act of his agent so long as the latter acts within the scope of his authority (*o*).

§ 194. These principles are so consonant to the dictates of natural justice, that it requires no argument to support or enforce them. The principles of natural justice and sound morals do, indeed, go farther; and require the most scrupulous good faith, candour, and truth in all dealings whatsoever. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far short of the principles deducible *ex æquo et bono*; and, with reference to the concerns of human life, they endeavour to aim at mere practical good and general convenience. Hence many things may be reprov'd in sound morals, which are left without any remedy, except by an appeal *in foro conscientie* to the party himself (*p*). Pothier has expounded this subject with his usual force and sterling sense. "As a matter of conscience" (says he), "any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts. Any dissimulation concerning the object of the contract, and what the opposite party has an interest in knowing, is contrary to that good faith; for since we are commanded to love our neighbour as ourselves, we are not permitted to conceal from him anything which we should be unwilling to have had concealed from ourselves under similar circumstances. But in civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party with whom he has contracted. Nothing but what is plainly injurious to good faith ought to be there considered as a fraud, sufficient to impeach a contract; such as the criminal manœuvres and artifices employed by one party to induce the other to enter into the contract. And these should be fully substantiated by proof. *Dolum non nisi perspicuis indiciiis probari convenit*" (*q*).

§ 195. The doctrine of law, as to misrepresentation, being in a practical view such as has been already stated, it may not be without use to illustrate it by some few examples. In the first place, the mis-

(*m*) *Rawlins v. Wickham*, 3 De G. & J. 304; *Adam v. Newbigging*, 13 App. Cas. 308; *Nocton v. Lord Ashburton*, [1914] A. C. 932.

(*n*) *Pearson v. Morgan*, 2 Bro. C. C. 389.

(*o*) *Udell v. Atherton*, 7 H. & N. 172; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mullens v. Miller*, 22 Ch. D. 194; *Lloyd v. Grace Smith & Co.*, [1912] A. C. 716.

(*p*) Pothier de Vente, n. 234, 235, 239.

(*q*) Pothier on Oblig. by Evans, p. 19, n. 30; Cod. Lib. 2, tit. 21, f. 6.

representation must be something material, constituting an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury (r). Thus, if a person owning an estate, should sell it to another, representing that the annual revenue from the sale of the timber amounted to £250, and this constituted an inducement to the other side to purchase, and the representation were utterly false, the contract for the sale, and the sale itself, if completed, might be avoided for fraud; for the representation would go to the essence of the contract (s). But if he should represent that the estate contained twenty acres of woodland or meadow, and the actual quantity was only nineteen acres and three-quarters, there, if the difference in quantity would have made no difference to the purchaser in price, value, or otherwise, it would not, on account of its immateriality, have avoided the contract (t). So, if a person should sell a ship to another, representing her to be five years old, of a certain tonnage, coppered and copper-fastened, and fully equipped, and found with new sails and rigging; any of these representations, if materially untrue, so as to affect the essence or value of the purchase, would avoid it. But a trifling difference in either of these ingredients, in no way impairing the fair value or price, or not material to the purchaser, would have no such effect. Thus, for instance, if the ship was a half-ton less in size, was a week more than five years old, was not copper-fastened in some unimportant place, and was deficient in some trifling rope, or had some sails which were in a very slight degree worn; these differences would not avoid the contract; for under such circumstances, the difference must be treated as wholly inconsequential (u). The rule of the civil law would here apply: *Res bonâ fide vendita propter minimam causam inempta fieri non debet*.

§ 196. So, if an executor of a will should obtain a release from a party interested in the estate, upon a representation, false in fact, that he had no interest therein (x); or if a compromise should be effected between two brothers upon the basis that the elder was illegitimate, which the younger knew at the date of the compromise was not the fact (y); in each of these cases the transaction would be set aside for fraud. But if, in point of fact, in the first case, a legacy, though given in the will, had been revoked by a codicil, the misrepresentation would not avoid the release, because it is immaterial to the rights of either party.

(r) *Pulsford v. Richards*, 17 Beav. 94; *Smith v. Chadwick*, 20 Ch. D. 27; *Bellaïrs v. Tucker*, 13 Q. B. D. 562.

(s) *Lowndes v. Lane*, 2 Cox 363.

(t) *McQueen v. Farquhar*, 11 Ves. 467; *Leslie v. Thompson*, 9 Ha. 268. See *Peers v. Lambert*, 7 Beav. 546.

(u) See 1 Domat, B. 1, tit. 2, § 11, art. 12.

(x) *Salkeld v. Vernon*, 1 Eden 64.

(y) *Gordon v. Gordon*, 3 Swanst. 400.

§ 197. It was the opinion of the author that the misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other (z). The cases cited by him do not sustain the conclusion that a person is justified in making a false statement to another if that other knew him to be an habitual liar. A party dealing at arm's length with another, or otherwise not bound to a full disclosure of the facts, is entitled to assume that the other party will rely upon his own judgment; and matters of opinion, where the parties are dealing upon equal terms, if falsely stated, are generally not sufficient to entitle the party relying upon their accuracy in fact to avoid a contract, and do not afford a complete answer to an action for specific performance (a).

§ 199. There may be cases in which the very extravagance of the statement may be of such a character that the true inference, as matter of evidence, is that the party was not in fact deceived, or else suffered from what Wigram, V.-C., once called "fraudulent blindness" (b). To this extent it is correct to say that a wilful misrepresentation may be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort (c). But the general principle established beyond cavil or question is that it is no defence that the falsity of a statement was discoverable upon inquiry made in quarters from which information could be obtained, and the party deceived has negligently abstained from inquiry (d).

§ 201. To the same ground of unreasonable indiscretion and confidence, may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts (e). In such cases the other party is bound, and, indeed, is understood, to exercise his own judgment, if the matter is equally open to the observation, examination, and skill of both. To such cases the maxim applies: *Simplex commendatio non obligat*. The seller represents the qualities or value

(z) See *Smith v. The Bank of Scotland*, 1 Dow 275; *Evans v. Bicknell*, 6 Ves. 173, 182 to 192.

(a) *Cadman v. Horner*, 18 Ves. 10; *Wall v. Stubbs*, 1 Mad. 80; *Haygarth v. Wearing*, L. R. 12 Eq. 320; *In re Pacaza Rubber & Produce Co., Lim., Burns' Application*, [1914] 1 Ch. 542.

(b) *Jones v. Smith*, 1 Hare, at p. 61; *Clapham v. Shillito*, 7 Beav. 146. See the principle stated and applied at the common law, *Shrewsbury v. Blount*, 2 Man. & G., at p. 504; *Bell v. Gardiner*, 4 Man. & G., at p. 24.

(c) *Fenton v. Browne*, 14 Ves. 144; *Trower v. Newcome*, 3 Mer. 704; *Kelly v. Enderton*, [1913] A. C. 191.

(d) *Central Railway of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Redgrave v. Hurd*, 20 Ch. D. 1.

(e) *Chandelo v. Lopus*, Cro. Jac. 2; *Scott v. Hanson*, 1 Sim. 13, 1 Russ. & M. 128; *In re Hurlbutt & Chaytor's Cont.*, 57 L. J. Ch. 421.

of the commodity, and leaves them to the judgment of the buyer. The Roman law adopted the same doctrine. “*Ea quæ commendandi causâ in venditionibus dicuntur, si palam appareant, venditorem non obligant; veluti, si dicat servum speciosum, domum bene ædificatam*” (f). But, if the means of knowledge are not equally open, the same law pronounced a different doctrine. “*At, si dixerit, hominem, literatum, vel artificem præstare debet; nam hoc ipso puris vendidit*” (g). The misrepresentation enhances the price. The same rule will apply if any artifice is used to disguise the character or quality of the commodity; or to mislead the buyer at the sale; such as holding out false colours, and thereby taking the buyer by surprise (h).

§ 202. In the next place, the party must be misled by the misrepresentation; for, if he knows it to be false, when made, it cannot be said to influence his conduct; and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances (i).

§ 203. And in the next place, the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that, to support an action at law for a misrepresentation, there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff. And it has been observed with equal truth, by a very learned judge, that fraud and damage coupled together will entitle the injured party to relief in any court of justice (k).

§ 204. Another class of cases for relief in equity is, where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another. It is not every concealment, even of facts material to the interest of a party, which will entitle him to the interposition of a court of equity. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent (l). It has been said by Cicero, “*Aliud est celare, aliud tacere. Neque enim id est celare, quidquid reticeas; sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire*” (m). It has been remarked by a learned

(f) Dig. Lib. 18, tit. 1, f. 43.

(g) Ibid.

(h) *Schneider v. Heath*, 3 Camp. 506; *Robinson v. Wall*, 2 Ph. 372; *Smith v. Harrison*, 26 L. J. Ch. 412.

(i) *Jennings v. Broughton*, 17 Beav. 234, 5 De G. M. & G. 120; *Nelson v. Stocker*, 4 De G. & J. 458.

(k) *Pasley v. Freeman*, 3 T. R. 51.

(l) *Turner v. Harvey*, Jac. 169; *Railton v. Mathews*, 10 Cl. & F. 934.

(m) Cic. de Offic. Lib. 3, ch. 12, 13. See Knight Bruce, V.-C., *Nelthorpe v. Holgate*, 1 Coll., at p. 221.

author, that this definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favour of either party, who is misled by his ignorance of the thing concealed (*n*). And Cicero proceeds to denounce such concealment in terms of vehement indignation. “*Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? Certè non aperti, non simplicis, non ingenui, non justis, non viri boni; versuti potius, obscuro, astuti, fallacis, malitiosi, callidi, veteratoris, vafri*” (*o*).

§ 205. But this statement is not borne out by the acknowledged doctrines, either of courts of law or of equity, in a great variety of cases. However correct Cicero's view may be of the duty of every man, in point of morals, to disclose all facts to another with whom he is dealing which are material to his interest, yet it is by no means true that courts of justice generally, or, at least, in England, undertake the exercise of such a wide and difficult jurisdiction. Thus it has been held by Lord Thurlow (and the case falls precisely within the definition by Cicero of undue concealment) that if A., knowing there is a mine in the land of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase the estate of B. for a price which the estate would be worth without considering the mine, the contract would be good, because A., as the buyer, is not obliged, from the nature of the contract, to make the discovery. In such cases the question is not whether an advantage has been taken, which in point of morals is wrong, or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also that there should be some obligation on the party to make the discovery. A court of equity will not correct or avoid a contract merely because a man of nice honour would not have entered into it. The case must fall within some definition of fraud, and the rule must be drawn so as not to affect the general transactions of mankind (*p*). And this, in effect, is the conclusion to which Pothier arrived, after a good deal of struggle, in adjusting the duties arising from moral obligation with the necessary freedom and convenience of the common business of human life (*q*).

§ 206. Mr. Chancellor Kent, in his learned commentaries, after admitting the doctrine and authority of Lord Thurlow in the case above stated, concludes with the following acute and practical reflections: “From this and other cases it would appear that human laws are not so perfect as the dictates of conscience, and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties that belong to the class of imperfect obligations

(*n*) Marshall on Insur. B. 1, ch. 11, § 3, p. 473.

(*o*) Cic. de Offic. Lib. 3, cap. 13.

(*p*) *For v. Mackreth*, 2 Bro. C. C. 420; *Turner v. Harvey*, Jac. 169.

(*q*) Pothier de Vente, n. 234, 242.

which are binding on conscience, but which human laws do not and cannot undertake directly to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway. And a purchase made with such a reservation of superior knowledge would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery. It is a rule in equity that all the material facts must be known to both parties to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance (r). The importance and value of the distinction here pointed out will be made more apparent when we come to the consideration of the cases in which courts of equity refuse to decree a specific performance of contracts which yet they will not undertake to set aside (s).

§ 207. The true definition, then, of undue concealment, which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right not merely *in foro conscientię* but *juris et de jure* to know (t). Mr. Chancellor Kent has avowed a broader doctrine. "As a general rule" (says he), "each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within reach of his observation" (u). This doctrine, in this latitude of expression, may, perhaps, be thought not strictly maintainable, or in conformity with that which is promulgated by courts of law or equity. For many most material facts may be unknown to one party and known to the other, and not equally accessible, or at the moment within the reach of both; and yet contracts founded upon such ignorance on one side and knowledge on the other may be completely obligatory. Thus, if one party has actual knowledge of an event or fact from private sources not then known to the other party from whom he purchases goods, and which knowledge would materially enhance the price of the goods or change the intention of the party as to the sale, the contract of sale of the goods will, nevertheless, be valid (x).

(r) 2 Kent, Comm. Lect. 39, pp. 490, 491 (4th edit. 3); *Ellard v. Lord Llandaff*, 1 Ball & Beat. 250, 251.

(s) See §§ 693, 769, 770, *infra*.

(t) *Fox v. Mackreth*, 2 Bro. C. C. 420; *Railton v. Mathews*, 10 Cl. & F. 934; *Hamilton v. Watson*, 12 Cl. & F. 109.

(u) 2 Kent, Comm. Lect. p. 482 (4th edit.), and note, *ibid.*, where it is now qualified.

(x) The case of the unknown mine, already put in the case of *Fox v. Mackreth*,

§ 208. Even Pothier himself, strongly as he inclines, in all cases of this sort, to the principles of sound morals, declares, that the buyer cannot be heard to complain that the seller has not informed him of circumstances extrinsic of the thing sold, whatever may be the interest which he has to know them (*y*). So that the doctrine of Mr. Chancellor Kent requires to be qualified, by limiting it to cases where one party is under some obligation to communicate the facts, or where there is a peculiar known relation, trust, or confidence between them, which authorizes the other party to act upon the presumption that there is no concealment of any material fact. Thus, if a vendor should sell an estate, knowing that he had no title to it, or knowing that there were incumbrances on it, of which the vendee was ignorant; the suppression of these or any other material facts, in respect to which the vendor must know that the very purchase implied a trust and confidence on the part of the vendee, that no such defect existed, would clearly avoid the sale on the ground of fraud (*z*).

§ 209. The like reason would apply to a case where the vendor should sell a house, situate in a distant town, which he knew at the time to be burnt down, and of which fact the vendee was ignorant; for it is impossible to suppose, that the actual existence of the house should not be understood by the vendee, as implied on the part of the vendor at the time of the bargain (*a*). The same doctrine prevails in the civil law. “*Sin autem venditor quidem sciebat domum esse exustam, emptor autem ignorabat, nullam venditionem stare*” (*b*).

§ 210. These latter cases are founded upon circumstances intrinsic in the contract, and constituting its essence. And there is often a material distinction between circumstances which are intrinsic, and form the very ingredients of the contract, and circumstances which are extrinsic, and form no part of it, although they may create inducements to enter into it, or affect the value or price of the thing sold. Intrinsic circumstances are properly those which belong to the nature, character, condition, title, safety, use, or enjoyment of the subject-matter of the contract; such as natural or artificial defects in the subject-matter. Extrinsic circumstances are properly those which are accidentally connected with it, or rather bear upon it, at the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract; such as facts respecting the occurrence of peace or war, the rise or fall of markets,

2 Bro. C. C. 420, seems to fall within this predicament; *Nelthorpe v. Holgate*, 7 Coll. 203. See also §§ 147, 148, and 149.

(*y*) Pothier, *Vente*, n. 242, 298, 299.

(*z*) *Davies v. Cooper*, 5 M. & Cr. 270; *Smith v. Harrison*, 26 L. J. Ch. 412; *Torrance v. Bolton*, L. R. 8 Ch. 118.

(*a*) See Pothier, *Vente*, n. 4; *ante*, § 142.

(*b*) Dig. Lib. tit. 1, f. 57, § 1; *ante*, § 142.

the character of the neighbourhood, the increase or diminution of duties, or the like circumstances (c).

§ 211. In regard to extrinsic, as well as to intrinsic circumstances, the Roman law seems to have adopted a very liberal doctrine, carrying out to a considerable extent the clear dictates of sound morals. It required the utmost good faith in all cases of contracts, involving mutual interests: and it, therefore, not only prohibited the assertion of any falsehood, but also the suppression of any facts, touching the subject-matter of the contract, of which the other party was ignorant, and which he had an interest in knowing. In an especial manner it applied this doctrine to cases of sales; and required that the vendor and vendee should disclose, each to the other, every circumstance within his knowledge touching the thing sold, which either had an interest in knowing. The declaration in regard to the vendor (as we have seen) is: “*Dolum malum a se abesse præstare venditor debet; qui non tantum in eo est, qui fallendi causâ obscurè, loquitur; sed etiam, qui insidiosè, obscurè dissimulat*”; and the same rule was applied to the vendee (d). According to these principles, the vendor was by the Roman law required, not only not to conceal any defects of the thing sold, which were within his knowledge, and of which the other party was ignorant, whenever those defects might, as vices, upon the implied warranty created by the sale, entitle him to a redhibition or a rescission of the contract; but also all other defects, which the other party was interested in knowing (e).

§ 212. In regard to intrinsic circumstances, the common law, however, has in many cases adopted a rule very different from that of the civil law; and especially in cases of sales of goods. In such cases, the maxim *caveat emptor* is applied; and unless there be some misrepresentation or artifice, to disguise the thing sold, or some warranty, as to its character or quality, the vendee is understood to be bound by the sale, notwithstanding there may be intrinsic defects and vices in it, known to the vendor, and unknown to the vendee, materially affecting its value. However questionable such a doctrine may be, in its origin, in point of morals or general convenience (upon which many learned doubts have, at various times, been expressed), it is too firmly established to be now open to legal controversy (f). And courts of equity, as well as courts of law, abstain from any interference with it.

§ 213. In regard to intrinsic circumstances generally, courts of equity, as well as courts of law, seem to adopt the same maxim to

(c) *Kenney v. Wexham*, 6 Mad. 355; *Scott v. Coulson*, [1903] 2 Ch. 249. Pothier, *Vente*, n. 236.

(d) Dig. Lib. 18, tit. 1, f. 43, § 2; Pothier, *Vente*, n. 233 to 241; *ibid.* n. 226; *ante*, § 192; Pothier, *Vente*, cited in note c, p. 185.

(e) Pothier, *Vente*, n. 235.

(f) *Chandelor v. Lopus*, Cro. Jac. 2; *Ward v. Hobbs*, 4 App. Cas. 13.

a large extent, and relax its application, only when there are circumstances of peculiar trust, or confidence, or relation between the parties.

§ 214. But there are cases of intrinsic circumstances, in which courts of law and courts of equity both proceed upon a doctrine strictly analogous to that of the Roman law, and treat the concealment of them as a breach of trust and confidence justly reposed. Indeed, in most cases of this sort, the very silence of the party must import as much as a direct affirmation, and be deemed equivalent to it (*g*).

§ 215. Thus, if a party taking a guarantee from a surety, conceals from him facts which go to vary the risk assumed in a material particular, or suffers him to enter into the contract under false impressions, as to the real state of the facts, such a concealment will amount to a fraud; because the party is bound to make the disclosure, and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist (*h*). So, if a party knowing himself to be cheated by his clerk, and, concealing the fact, applies for security in such a manner and under such circumstances, as would naturally lead to the inference that he considers the clerk to be a trustworthy person; and another person becomes his security, acting under the impression that the clerk is so considered by his employer; the contract of suretyship will be void (*i*); for the very silence, under such circumstances, becomes expressive of a trust and confidence held out to the public, equivalent to an affirmation.

§ 216. Cases of insurance afford another illustration of the same doctrine. In such cases the insurer necessarily reposes a trust and confidence that the assured will disclose all facts and circumstances materially affecting the risk, which are peculiarly within his knowledge, and which are not of a public and general nature, or which the underwriter does not know, or is not bound to know. Indeed, most of the facts and circumstances which may affect the risk, are generally within the knowledge of the assured only; and therefore, the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And hence, the general principle is, that in all cases of insurance the assured is bound to communicate to the insurer all facts and circumstances material to the risk, within his

(*g*) See *Martin v. Morgan*, 1 Brod. & Bing. 289; *Owen v. Homan*, 4 H. L. C. 997; *Davies v. London and Provincial Marine Ins. Co.* 8 Ch. D. 469.

(*h*) *Pidcock v. Bishop*, 3 B. & C. 605; *Stone v. Compton*, 5 Bing. N. C. 142; *Railton v. Mathews*, 10 Cl. & F. 935; *Hamilton v. Watson*, 12 Cl. & F. 119; *North British Ins. Co. v. Lloyd*, 10 Ex. 523; *Kingston-upon-Hull Corporation v. Harding*, [1892] 2 Q. B. 494

(*i*) *Lee v. Jones*, 17 C. B. (n.s.) 482; *Phillips v. Foxhall*, L. R. 7 Q. B. 666; *London Gen. Omnibus Co. v. Holloway*, [1912] 2 K. B. 72; *Nat. Prov. Bank of England v. Baron Glanusk*, [1913] 3 K. B. 335.

knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract (*k*).

§ 217. The same principle applies in all cases where the party is under an obligation to make a disclosure, and conceals material facts. Therefore, if a release is obtained from a party in ignorance of material facts, which it is the duty of the other side to disclose, the release will be held to be invalid (*l*). So, in cases of family agreements, and compromises, if there is any concealment of material facts, the compromise will be held invalid, upon the ground of mutual trust and confidence reposed between the parties (*m*). And, in like manner, if a devisee, by concealing from the heir the fact that the will has not been duly executed, procures from the latter a release of his title, pretending that it will facilitate the raising of money to pay the testator's debts, the release will be void on account of the fraudulent concealment (*n*).

§ 218. But by far the most comprehensive class of cases of undue concealment arises from some peculiar relation, or fiduciary character between the parties. Among this class of cases are to be found those which arise from the relation of client and solicitor, principal and agent, principal and surety, parent and child, guardian and ward, ancestor and heir, trustee and *cestui que trust*, executors or administrators and creditors, legatees or other beneficiaries, appointer and appointee under powers, and partner and part-owners. In these, and the like cases, the law, in order to prevent undue advantage, from the unlimited confidence, affection, or sense of duty, which the relation naturally creates, requires the utmost degree of good faith (*uberrima fides*) in all transactions between the parties. If there is any misrepresentation, or any concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose, and pronounce the transaction void, and, as far as possible, restore the parties to their original rights.

§ 219. This subject will naturally come in review in a subsequent page, when we come to consider what may be deemed the peculiar equities between parties in these predicaments, and the guards which are interposed by the law by way of prohibition upon their transactions (*o*). It may suffice here, merely by way of illustration, to suggest a few applications of the doctrine. Thus, for instance, if a solicitor, employed by the party, should designedly conceal from his client a material fact or principle of law, by which he should

(*k*) Marine Insurance Act, 1906, s. 18; *Sibbald v. Hill*, 2 Dow. 263; *Rivaz v. Gerussi*, 6 Q. B. D. 222; *The Bedouin*, [1894] P. 1; *Cantiere Meccanico Brindisino v. Jansen*, [1912] 3 K. B. 452.

(*l*) *Lloyd v. Attwood*, 3 De G. & J. 614; *Farrant v. Blanchford*, 1 De G. J. & S. 107.

(*m*) *Gordon v. Gordon*, 3 Swanst. 399.

(*n*) *Broderick v. Broderick*, 1 P. Will. 239, 249.

(*o*) *Post*, §§ 308 to 328.

gain an interest not intended by the client, it will be held a positive fraud, and he will be treated as a mere trustee for the benefit of his client and his representatives. And, in a case of this sort, it will not be permitted to the solicitor to set up his ignorance of law, or his negligence, as a defence or an excuse. It has been justly remarked, that it would be too dangerous to the interests of mankind, to allow those who are bound to advise, and who ought to be able to give good and sound advice, to take advantage of their own professional ignorance to the prejudice of others (*p*). Solicitors must, from the nature of the relation, be held bound to give all the information which they ought to give, and not be permitted to plead ignorance of that which they ought to know.

§ 220. In like manner, a trustee cannot, by the suppression of a fact, entitle himself to a benefit, to the prejudice of his *cestui que trust*. Thus, formerly, a creditor of the husband concealing the fact could not, by procuring himself, by such concealment, to be appointed the trustee of the wife, entitle himself to deduct his debt from the trust fund against the wife or her representatives, or even against the person in whose favour, and at whose instance, he had made the suppression (*q*). So, if a partner, who exclusively superintends the business and accounts of the concern, should, by concealment of the true state of accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void (*r*).

§ 221. Having taken this general notice of cases of fraud, arising from the misrepresentation or concealment of material facts, we may now pass to the consideration of some others, which, in a moral as well as in a legal view, seem to fall under the same predicament, that of being deemed cases of actual, intentional fraud, as contradistinguished from constructive or legal fraud. In this class may properly be included all cases of unconscientious advantages in bargains, obtained by imposition, circumventions, surprise, and undue influence, over persons in general; and in an especial manner, all unconscientious advantages, or bargains obtained over persons disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, or other incapacity, from taking due care of, or protecting their own rights and interests.

§ 222. The general theory of the law, in regard to acts done and contracts made by parties, affecting their rights and interests, is, that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. And, therefore, it has been well remarked by an able commentator

(*p*) *Bulkley v. Wilford*, 2 Cl. & F. 102; *post*, § 311

(*q*) *Dalbiac v. Dalbiac*, 16 Ves. 115; *post*, § 321.

(*r*) *Maddford v. Austwick*, 1 Sim. 89; 2 M. & K. 279; *Helmore v. Smith*, 35 Ch. D. 436.

upon the law of nature and nations, that every true consent supposes three things: first, a physical power; secondly, a moral power; and, thirdly, a serious and free use of them. And Grotius has added, that what is not done with a deliberate mind does not come under the class of perfect obligations (s). And hence it is that, if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. For, although the law will not generally examine into the wisdom or prudence of men in disposing of their property, or in binding themselves by contracts or by other acts, yet it will not suffer them to be entrapped by the fraudulent contrivances, or cunning, or deceitful management of those who purposely mislead them.

§ 223. It is upon this general ground, that there is a want of rational and deliberate consent, that the contracts and other acts of idiots, lunatics, and other persons, *non compotes mentis*, are generally deemed to be voidable in courts of equity. But it is difficult to appreciate the mental attitude of the learned author who collected in this and subsequent paragraphs, cases dealing with the capacity of a party to contract under a category of actual fraud. An advantage taken by a person who knows that the other contracting party is insane, is a fraud, but nothing short of this will invalidate the contract (t), unless the party has been found to be a lunatic by inquisition (u).

§ 230. Lord Coke has enumerated four different classes of persons who are deemed in law to be *non compotes mentis*. The first is an idiot, or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus qui gaudet lucidis intervallis*, and sometimes is of a good and sound memory, and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard (x). In respect to the last class of persons, although it is regularly true that drunkenness doth not extenuate any act or offence committed by any person against the laws; but it rather aggravates it, and he shall gain no privilege thereby; and, although in strictness of law, the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*; yet courts of equity will relieve against acts done, and contracts made, by him while under this temporary insanity, where they are procured by the fraud or imposition of the other party. For, whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection

(s) Grotius de Jure Belli et Pacis, Lib. 2, ch. 11, § 4.

(t) *Campbell v. Hooper*, 3 Sm. & G. 153; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599; Sale of Goods Act, 1894, s. 2. See *In re Rhodes*; *Rhodes v. Rhodes*, 44 Ch. D. 94.

(u) *In re Walker*, [1905] 1 Ch. 160.

(x) *Beverley's Case*, 4 Co. 124.

of courts of equity against his own grossly immoral and fraudulent conduct (*y*).

§ 231. But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part; and without this, no contract or other act can or ought to be binding by the law of nature (*z*). If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him (*a*). For, in general, courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practised (*b*).

§ 232. It is upon this special ground that courts of equity have acted in cases where a broader principle has sometimes been supposed to have been upheld. They have, indeed, indirectly, by refusing relief, sustained agreements, which have been fairly entered into, although the party was intoxicated at the time. And especially, they have refused relief where the agreement was to settle a family dispute, and was in itself reasonable (*c*). But they have not gone the length of giving a positive sanction to such agreements, so entered into, by enforcing them against the party, or in any other manner than by refusing to interfere in his favour against them (*d*).

§ 234. Closely allied to the foregoing are cases where a person, although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises; whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear, or constitu-

(*y*) See *Cook v. Clayworth*, 18 Ves. 12.

(*z*) *Cook v. Clayworth*, 18 Ves. 12; *Lord Dunboyne v. Mulvihill*, 1 Bli. 137.

(*a*) *Cook v. Clayworth*, 18 Ves. 12; *Say v. Barwick*, 1 Ves. & B. 195.

(*b*) *Cooke v. Clayworth*, 18 Ves. 12.

(*c*) *Cory v. Cory*, 1 Ves. Sen. 19; *Dunnage v. White*, 1 Swanst. 137, 150.

(*d*) *Lightfoot v. Heron*, 3 Y. & C. Ex. 586; *Shaw v. Thackray*, 1 Sm. & G. 537.

tional despondency, or overwhelming calamities (e). For it has been well remarked that, although there is no direct proof that a man is *non compos*, or delirious, yet, if he is a man of weak understanding, and is harassed and uneasy at the time, or if the deed is executed by him *in extremis*, or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might be very easily imposed upon. "It is not every bargain which distress may induce one man to offer, that another is at liberty to accept" (f).

§ 237. The language of Lord Wynford, in *Blachford v. Christian* (g), applies a mode of reasoning to the subject compatible at once with the dictates of common sense and legal exactness and propriety. "The law will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no court of justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property. Indeed, from the fluctuation of prices, owing principally to the gambling spirit of speculation that now unhappily prevails, it would be difficult to determine what is an adequate price for anything sold. At the time of the sale the buyer properly calculates on the rise in the value of the article bought, of which he would have the advantage. He must not, therefore, complain if his speculations are disappointed, and he becomes a loser, instead of a gainer, by his bargain. But those who, from imbecility of mind, are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood. A bargain, therefore, into which a weak one is drawn, under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man." And, addressing himself to the case before him, he added: "If this conveyance could be impeached on the ground of the imbecility of Fitzsimmons only, a sufficient case has not been made out to render it invalid; for the imbecility must be such as would justify a jury, under a commission of lunacy, in putting his property and person under the protection of the chancellor. But a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed" (h).

(e) *Gibson v. Russell*, 2 Y. & C. Ch. 104.

(f) *Grant, M.R., Bowes v. Heaps*, 3 Ves. & B. 119.

(g) *Blachford v. Christian*, 1 Knapp, 77.

(h) *Ibid.*

§ 238. The doctrine, therefore, may be laid down as generally true “ that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence ” (i). It has been said that the common law required that a person, to dispose of his property by will should be of sound and disposing memory, which imports that the testator should have understanding to dispose of his estate with judgment and discretion; and this is to be collected from his words, actions, and behaviour at the time, and not merely from his being able to give a plain answer to a common question (k). The doctrine has long since been abandoned. But, as fraud in regard to the making of wills of real estate belonged in a peculiar manner to courts of law, and fraud in regard to personal estate to the Court of Probate, although sometimes relievable in equity, that part of the subject seems more proper to be discussed in a different treatise (l).

§ 239. Cases of an analogous nature may easily be put, where the party is subjected to undue influence, although in other respects of competent understanding. As, where he does an act, or makes a contract, when he is under duress, or the influence of extreme terror, or of threats, or of apprehensions short of duress. For, in cases of this sort, he has no free will, but stands *in vinculis*. And the constant rule in equity is, that, where a party is not a free agent, and is not equal to protecting himself, the court will protect him (m). The maxim of the common law is: “ *Quod aliàs bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur* ” (n). On this account courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment; and, if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside (o). Illiteracy (p), or circumstances of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the court in setting

(i) See *Gartside v. Isherwood*, 1 Bro. C. C. 560, 561.

(k) *Waring v. Waring*, 6 Moo. P. C. 341.

(l) *Jenkins v. Moore*, 14 Ch. D. 674; *Allen v. McPherson*, 1 H. L. C. 191; *Melhuish v. Milton*, 3 Ch. D. 27.

(m) *Baker v. Monk*, 4 De G. J. & S. 388; *Rees v. De Bernardy*, [1896] 2 Ch. 437.

(n) *Fermor's Case*, 3 Co. 78.

(o) *Roy v. Duke of Beaufort*, 2 Atk. 190.

(p) *Price v. Price*, 1 De G. M. & G. 308.

aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition, attendant upon it (*q*).

§ 240. The acts and contracts of infants, that is, of all persons under twenty-one years of age (who are by the common law deemed infants), are, *à fortiori*, treated as falling within the like predicament. For infants are by law generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment of understanding; and, therefore, their grants and those of lunatics are, in many respects, treated as parallel both in law and reason. There are, indeed, certain excepted cases, in which infants are permitted by law to bind themselves by their acts and contracts. But these are all of a special nature; as, for instance, infants may bind themselves by a contract for necessities, suitable to their degree and quality (*r*); or by a contract of hiring and services for wages (*s*); or by some act which the law requires them to do. And, generally,

(*q*) *Fry v. Lane*, 40 Ch. D. 312. The doctrine of the common law, upon the subject of avoiding contracts upon the ground of mental weakness, or force, or undue influence, does not seem, in any essential manner, to differ from that adopted in the Roman law, or in the law of modern continental Europe. Thus we find in the Roman law, that contracts may be avoided, not only for incapacity, but for mental imbecility, the use of force, or the want of liberty in regard to the party contracting. Ait Prætor, Quod metus causâ gestum erit, ratum non habeo. Dig. Lib. 4, tit. 2, f. 1. But then the force, or fear, must be of such a nature as may well overcome a firm man. Metum accipiendum, Labeo dicit, non quemlibet timorem, sed majoris malitatis. Dig. Lib. 4, tit. 2, f. 5. The party must be intimidated by the apprehension of some serious evil of a present and pressing nature. Metum non vani hominis sed qui merito et in hominem constantissimum cadat. Dig. Lib. 4, tit. 2, f. 6. He must act, Metu majoris malitatis; and feel that it is immediate; Metum presentum accipere debemus, non suspicionem inferendi ejus. See Dig. Lib. 4, tit. 2, f. 9; 1 Domat, Civil Law, B. 1, tit. 18, § 2, art. 1 to 10. Pothier gives his assent to this general doctrine; but he deems the civil law too rigid in requiring the menace or force to be such as might intimidate a constant or firm man; and very properly thinks that regard should be had to the age, sex, and condition of the parties. Pothier on Olig. n. 25. Mr. Evans thinks that any contract produced by the actual intimidation of another ought to be held void, whether it were the result of personal infirmity merely, or of such circumstances as might ordinarily produce the like effect upon others. 1 Evans, Pothier on Oblig. n. 25, note (*a*), p. 18. The Scottish law seems to have followed out the line of reasoning of the Roman law with a scrupulous deference and closeness. Ersk. Inst. B. 4, tit. 1, § 26. The Scottish law also puts the case of imposition from weakness upon a clear ground. "Let one be ever so subject to imposition, yet, if he has understanding enough to save himself from a sentence of idiocy, the law makes him capable of managing his own affairs, and consequently his deeds, however hurtful they may be to himself, must be effectual, unless evidence be brought, that they have been drawn or extorted from him by unfair practices. Yet where lesion (injury) in the deed and facility in the grantor concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside." Ersk. Inst. B. 4, tit. 1, § 27. Mr. Bell has also stated the same principle in the Scottish law with great clearness. There may be in one of perfect age a degree of weakness, puerility, or prodigality, which although not such as to justify a verdict of insanity, and place him under guardianship, as insane, may yet demand some protection for him against unequal or gratuitous alienation. 1 Bell, Comm. 139. See *Harvey v. Mount*, 8 Beav. 439.

(*r*) Sale of Goods Act, 1894, s. 2; *Nash v. Inman*, [1908] 2 K. B. 1; *Stocks v. Wilson*, [1913] 2 K. B. 235.

(*s*) *Roberts v. Gray*, [1913] 1 K. B. 520.

infants are favoured by the law, as well as by equity, in all things which are for their benefit, and are saved from being prejudiced by anything to their disadvantage. But this rule is designed as a shield for their own protection; it is not allowed to operate as a fraud or injustice to others; at least not where a court of equity has authority to reach it in cases of meditated fraud.

§ 241. In regard to the acts of infants, some are voidable and some are void; and so, also, in regard to their contracts, some are voidable and some are void. Where they are utterly void, they are from the beginning mere nullities, and incapable of any operation. But where they are voidable, it is in the election of the infant to avoid them or not, which he may do, when he arrives at full age. In this respect, he is by law differently placed from idiots and lunatics; for the latter, as we have seen, are not, or at least may not, at law, be allowed to stultify themselves. But an infant may, at his coming of age, avoid or confirm any voidable act or contract at his pleasure. In general, where a contract may be for the benefit or to the prejudice of an infant, he may avoid it as well at law as in equity. Where it can never be for his benefit, it is utterly void. And in respect to the acts of infants of a more solemn nature, such as deeds, gifts, and grants, this distinction has been insisted on, that such as do take effect by delivery of his hand are voidable; but such as do not so take effect are void (*t*). In a late case it was held that an infant's contract in respect of a subject of a permanent character is not void, but merely voidable; and if the infant wishes to repudiate such a contract, he must do so before or within a reasonable time after he attains full age (*u*).

§ 241a. The power of infants to contract has been further restricted by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), and the Betting and Loans (Infants) Act, 1892. An infant may make a valid settlement upon marriage if the sanction of the court be obtained under the Infants' Settlement Act, 1855 (*x*).

§ 242. But, independently of these general grounds, it is clear, that contracts made and acts done by infants in favour of persons knowing their imbecility and want of discretion, and intending to take advantage of them, ought, upon general principles, to be held void, and set aside, on account of fraud, circumvention, imposition, or undue influence. And it is upon this ground of an inability to give a deliberate and binding consent, that the nullity of such acts and contracts is constantly put by publicists and civilians. *Infans non multum a furioso distat*.

(*t*) *Zouch v. Parsons*, 3 Burr. 1794; *Keane v. Boycott*, 2 H. Bl. 511; *In re Maskell and Goldfinch's Cont.*, [1895] 2 Ch. 525.

(*u*) *Whittingham v. Murdy*, 60 L. T. 956.

(*x*) *Seaton v. Seaton*, 13 App. Cas. 61; *Duncan v. Dixon*, 44 Ch. D. 211; *Edwards v. Carter*, [1893] A. C. 360.

§ 242*a*. If an infant obtains money or goods by fraudulently representing himself to be of full age, he becomes liable to the other contracting party, but the liability only arises upon the act of the infant—concealment is insufficient to fix him with liability (*y*).

§ 243. In regard to *femes covert*, the case is still stronger; for, generally speaking, at law they had no capacity to do any acts, or to enter into any contracts; and such acts and contracts were treated as mere nullities. A married woman could act as the agent of her husband at law (*z*). Equity followed the law except as regards the wife's equitable interest in property, in respect to which she could contract and make herself liable in contract in respect of her separate estate (*a*). This power has since been confirmed and extended by the Married Women's Property Act, 1882. If the married woman was restrained from anticipation, she could not be made liable by reason of her fraudulent concealment or denial of a marriage or of the restraint (*b*).

§ 244. Of a kindred nature to the cases already considered, are cases of bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud to which Lord Hardwicke alluded, in the passage already cited (*c*), when he said, that they were such bargains that no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other, being inequitable and unconscientious bargains (*d*). Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity (*e*). For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon.

§ 245. Inadequacy of consideration is not, then, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the

(*y*) *Stikeman v. Dawson*, 1 De G. & Sm. 90; *Stocks v. Wilson*, [1913] 2 K. B. 235; *Leslie, Lim. v. Shiell*, 29 L. T. R. 554.

(*z*) *Debenham v. Mellon*, 6 App. Cas. 24.

(*a*) *Hulme v. Tennant*, 1 Bro. C. C. 16; *Pike v. Fitzgibbon*, 17 Ch. D. 454.

(*b*) *Jackson v. Hobhouse*, 2 Mer. 483; *Cannam v. Farmer*, 3 Ex. 698; *Sharpe v. Foy*, L. R. 4 Ch. 35; *Stanley v. Stanley*, 7 Ch. D. 589.

(*c*) *Ante*, § 188.

(*d*) *Chesterfield v. Janssen*, 2 Ves. Sen. 155; *Grant, M.R., Bowes v. Heaps*, 3 Ves. & B. 119.

(*e*) *Wigram, V.-C., Borell v. Dann*, 2 Hare, 440; *Middleton v. Brown*, 47 L. J. Ch. 411.

contract (f). Common sense knows no such principle. The value of a thing is what it will produce; and it admits of no precise standard. It must be of its nature fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to part with it at a particular time. If courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind (g). Such a consequence would, of itself, be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief.

§ 246. Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud (h). And where there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud (i).

§ 247. The difficulty of adopting any other rule, which would not, in the common intercourse and business of human life, be found productive of serious inconvenience and endless litigation, is conceded by civilians and publicists; and, for the most part, they seem silently to abandon cases of inadequacy in bargains where there is no fraud, to the forum of conscience, and morals, and religion. Thus, Domat, after remarking that the law of nature obliges us not to take advantage of the necessities of the seller, to buy at too low a price, adds: "But because of the difficulties in fixing the just price of things, and of the inconveniences, which would be too many and too great, if all sales were annulled, in which the things were not sold at their just value, the laws connive at the injustice of buyers, except in the sale of lands, where the price given for them is less than half of their value" (k). So that, in the civil law, sales of personal property are usually without redress; and even sales of immovable property are in the same predicament, unless the inadequacy of price amounts to one-half the value: a rule purely artificial, and which must leave behind it many cases of gross hardship and unconscionable advantage.

(f) *Haigh v. Brooks*, 10 A. & E. 309.

(g) Per Eyre Ch. B. in *Griffith v. Spratley*, 1 Cox 383.

(h) *Coles v. Trecothick*, 9 Ves. 246; *Copis v. Middleton*, 2 Mad. 409.

(i) *Stillwell v. Wilkinson*, Jac. 280.

(k) 1 Domat, Civil Law, B. 1, tit. 2, § 3, 9, art. 1. See also Heineccius, Elem. I. N. et G. § 352; id. § 340.

The civil law, therefore, in fixing a moiety, and confining it to immovable property, admits, in the most clear manner, the impracticability of providing for all cases of this nature. “Rem majoris pretii” (says the Code) “si tu, vel pater tuus minoris distraxerit; humanum est, ut vel pretium te restituente emptoribus, fundum venundatum recipias, auctoritate judicis intercedente; vel si emptor elegerit, quod deest justo pretio, recipias” (l); thus laying down the broadest rule of equity and morals, adapted to all cases. But the law-giver, struck with the unlimited nature of the proposition, immediately adds in the same law, that the party shall not be deemed to have sold at an undervalue, unless it amounts to one-half. “Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit” (m); a logic not very clear indisputable (n). And yet the civil law was explicit enough in denouncing fraudulent bargains. “Si pater tuus per vim coactus domum vendidit; ratum non habebitur, quod non bonâ fide gestum est. Malæ fidei emptio irrita est (o). Ad rescindendam venditionem, et malæ fidei probationem, hoc solum non sufficit, quod, magno pretio fundum comparatum, minoris distractum esse commemoras” (p). So that we see, in this last passage, the very elements of the doctrine of equity on this subject.

§ 248. Pothier, too, of whom it has been remarked, that he is generally swayed by the purest morality, says: “Equity ought to preside in all agreements. Hence it follows, that, in contracts of mutual interest, where one of the contracting parties gives or does something, for the purpose of receiving something else, as a price and compensation for it, an injury suffered by one of the contracting parties, even when the other has not had recourse to any artifice to deceive him, is alone sufficient to render such contracts vicious. For as equity, in matters of commerce, consists in equality, when that equity is violated, as when one of the parties gives more than he receives, the contract is vicious for want of the equity which ought to preside in it.” He immediately adds: “Although any injury whatever renders contracts inequitable, and consequently vicious, and the principle of moral duty (*le for interieur*) induces the obligation of supplying the just price; yet persons of full age are not allowed in point of law to object to their agreements as being injurious, unless

(l) Cod. Lib. 4, tit. 44, l. 2; id. l. 9; Heinecc. Elem. J. N. and N. § 340, 352; *post*, § 248.

(m) Cod. Lib. 4, tit. 44, l. 2; id. l. 9; 1 Domat, Civil Law, B. 1, tit. 2, § 9.

(n) In another place the civil law, in relation to sales, seems plainly to wink out of sight the immorality of inadequate bargains. Quemadmodum in emendo et vendendo naturaliter concessum est, quod pluris sit, minoris emere, quod minoris sit, pluris vendere. Et ita invicem se circumscribere, ita in locationibus quoque et conditionibus juris est. Dig. Lib. 19, tit. 2, f. 22, § 3; 1 Domat, Civil Law, B. 1, tit. 18, p. 247.

(o) Cod. Lib. 4, tit. 44, l. 1, 4, 8.

(p) Cod. Lib. 4, tit. 44, l. 4; id. l. 8, 10. See 1 Domat, B. 1, tit. 18, Vices of Covenants, p. 247.

the injury be excessive; a rule wisely established for the security and liberty of commerce, which requires that a person shall not be easily permitted to defeat his agreements; otherwise we should not venture upon making any contract, for fear that the other party, imagining himself to be injured by the terms of it, would oblige us to follow it by a lawsuit. That injury is commonly deemed excessive which amounts to more than a moiety of the just price. And the person who has suffered such an injury may, within ten years, obtain letters of rescission for annulling the contract" (*q*).

§ 249. After such concessions we may well rest satisfied with the practical convenience of the rule of the common law, which does not make the inequality of the bargain depend solely upon the price, but upon the other attendant circumstances which demonstrate imposition, or some undue influence. The Scottish law has adopted the same practical doctrine (*r*).

§ 250. This part of the subject may be concluded by the remark that courts of equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo*; as, for instance, in cases of marriage settlements, for the court cannot unmarry the parties (*s*).

§ 251. Cases of surprise, and sudden action without due deliberation, may properly be referred to the same head of fraud or imposition (*t*). An undue advantage is taken of the party under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning. It has been very justly remarked by an eminent writer that it is not every surprise which will avoid a deed duly made. Nor is it fitting, for it would occasion great uncertainty, and it would be impossible to fix what is meant by surprise, for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be. The surprise here intended must be accompanied with fraud and circumvention, or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him. If proper time is not allowed to the party and he acts improvidently, if he is importunately pressed, if those in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences, but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called upon to act, in circumstances of sudden emergency, or unexpected right or acquisition; in these and many like cases, if there

(*q*) Pothier on Oblig. n. 33, 34, by Evans; *ante*, § 347.

(*r*) Erskine, Inst. B. 4, tit. 1, § 27; *ante*, § 247.

(*s*) 1 Mad. Pr. Ch. 215; *North v. Ansall*, 2 P. Will. 619.

(*t*) *Evans v. Llewellyn*, 1 Cox, 333.

has been great inequality in the bargain, courts of equity will assist the party upon the ground of fraud, imposition, or unconscionable advantage (*u*).

§ 252. Many other cases might be put, illustrative of what is denominated actual or positive fraud. Among these are cases of the fraudulent suppression or destruction of deeds and other instruments in violation of, or injury to, the rights of others (*x*); fraudulent awards, with an intent to do injustice (*y*); fraudulent appointments and revocations, under powers (*z*), fraudulent prevention of acts to be done for the benefit of others, under false statements or false promises (*a*); frauds in relation to trusts of a secret or special nature (*b*); frauds in verdicts, judgments, decrees, and other judicial proceedings (*c*); frauds in the confusion of boundaries of estates and matters of partition and dower; frauds in the administration of charities; and frauds upon creditors, and other persons, standing upon a like equity.

§ 253. Some of the cases falling under each of these heads belong to that large class of frauds commonly called constructive frauds, which will naturally find a place in our future pages. But, as it is the object of these Commentaries, not merely to treat of questions of relief, but also of principles of jurisdiction, a few instances will be here adduced as examples of both species of fraud.

§ 254. In the first place, as to the suppression and destruction of deed and wills and other instruments. If an heir should suppress them in order to prevent another party, as a grantee or devisee, from obtaining the estate vested in him thereby, courts of equity, upon due proof by other evidence, would grant relief, and perpetuate the possession and enjoyment of the estate in such grantee or devisee (*d*). For cases for relief against spoliation come in a favourable light before courts of equity, *in odium spoliatoris*; and where the contents of a suppressed or destroyed instrument are proved, the party (as he ought) will receive the same benefit as if the instrument were produced (*e*).

§ 255. In the next place, frauds in regard to powers of appointment. A person having a power of appointment for the benefit of others shall not, by any contrivance, use it for his own benefit. Thus, if a parent has a power to appoint to such of his children as he may

(*u*) *Evans v. Llewellyn*, 1 Cox 439; *Marq. Townshend v. Stangroom*, 6 Ves. 338; *Pickett v. Loggon*, 14 Ves. 215.

(*x*) *Sharpe v. Foy*, L. R. 4 Ch. 35.

(*y*) *Moseley v. Simpson*, L. R. 16 Eq. 226.

(*z*) *In re Marsden's Trust*, 4 Drew. 594.

(*a*) *Luttrell v. Lord Waltham*, cited 14 Ves. 290.

(*b*) *Duke of Portland v. Topham*, 11 H. L. C. 32; further proceedings *Topham v. Duke of Portland*, L. R. 5 Ch. 40.

(*c*) *Exp. White*, 4 H. L. C. 313; *Shedden v. Patrick*, 1 Macq. 535; *Flower v. Lloyd*, 10 Ch. D. 327; *Williams v. Preston*, 20 Ch. D. 672.

(*d*) *Hampden v. Hampden*, 1 Bro. P. C. 250; *Tucker v. Phipps*, 3 Atk. 358.

(*e*) *Mallet v. Halfpenny*, cited Prec. Ch. 404; *Farrer v. Hutchinson*, 3 Y. & C. Ex. 692. For a case of fraudulent mutilation of marriage register where relief was denied by reason of lapse of time, see *Chatham v. Hoare*, L. R. 9 Eq. 571.

choose, he shall not, by exercising it in favour of a child in a consumption, gain the benefit of it himself, or by a secret agreement with a child, in whose favour he makes it, derive a beneficial interest from the execution of it (f). A donee is not entitled to exercise a power of appointment so as to benefit a person not an object of the power (g), special powers being regarded as fiduciary in the eyes of a court of equity (h). Upon this principle where a parent, having a power to appoint among his children, made an illusory appointment, by giving to one child a nominal and not a substantial share; for, in such a case, courts of equity would treat the execution as a fraud upon the power (i). But by force of the Illusory Appointments Act, 1 Will. IV. c. 46, and the 37 & 38 Vict. c. 37, the donee of a power may now exclude any object of the power unless the instrument creating the power shall declare the amount or share from which no object of the power shall be excluded (k).

§ 255 a. There were decisions, that a power given to raise portions, being a discretionary trust, did not authorise the donee to make an appointment giving vested interests to children of tender years, and that if such an appointment were made, a court of equity would control it by refusing to allow the portions to be raised if the children did not live to want them. The rule now as laid down by the Court of Appeal is, that where a donee of a power of charging portions on real estate is not, under the terms of the power, restricted as to the times at which portions shall vest, appoints a portion to vest immediately, this portion can be raised in the event of the child dying under twenty-one and unmarried, unless from the circumstances of the case it appears that the appointment was a fraud on the power (l).

§ 255 b. There is an intermediate class of appointments which have been held to be fraudulent, where the donee has sought to attain a particular object which was inadmissible according to the terms or legal effect of the power (m). This must be distinguished from the motive, such as spite or ill-will, which induces the particular appointment (n).

§ 256. In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of equity hold themselves

(f) *McQueen v. Farquhar*, 11 Ves. 479; *In re Perkins*; *Perkins v. Bagot*, [1893] 1 Ch. 283.

(g) *In re Marsden's Trust*, 4 Drew, 594; *Whelan v. Palmer*, 39 Ch. D. 698.

(h) *Harding v. Glyn*, 1 Atk. 469; *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *In re Bradshaw*; *Bradshaw v. Bradshaw*, [1902] 1 Ch. 436.

(i) *Kemp v. Kemp*, 5 Ves. 849; *Butcher v. Butcher*, 1 Ves. & B. 79.

(k) *In re Capon's Trusts*, 10 Ch. D. 484; *In re Deakin*; *Starkey v. Eyres*, [1894] 3 Ch. 565.

(l) *Henty v. Wrey*, 21 Ch. D. 350.

(m) *Duke of Portland v. Topham*, 11 H. L. C. 32; *Topham v. Duke of Portland*, L. R. 5 Ch. 40.

(n) *Vane v. Lord Dungannon*, 1 Sch. & L. 118; *Campbell v. Horne*, 1 Y. & C. Ch. 664.

entirely competent to take from third persons, and *à fortiori*, from the party himself, the benefit which may be derived from his fraud, imposition, or undue influence, in procuring the suppression of such acts (o). Thus, where a person had fraudulently prevented another, upon his death-bed, from suffering a recovery at law, with a view that the estate might devolve upon another person, with whom he was connected; it was adjudged, that the estate ought to be held as if the recovery had been perfected, and that it was against conscience to suffer it to remain where it was (p). So, if a testator should communicate his intention to a devisee of charging a legacy on his estate, and the devisee should tell him that it is unnecessary, and he will pay it, the legacy being thus prevented, the devisee will be charged with the payment (q). And instances might be multiplied indefinitely (r).

§ 257. We may close this head of positive or actual fraud, by referring to another class of frauds, of a very peculiar and distinct character. Gifts and legacies are often bestowed upon persons, upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. And the question has sometimes occurred, how far courts of equity can or ought to interfere, where such consent is fraudulently withheld by the proper party, for the express purpose of defeating the gift or legacy, or of insisting upon some private and selfish advantage, or from motives of a corrupt, unreasonable, or vicious nature. It has been said that courts of equity will not suffer the manifest object of the condition to be defeated by the fraud or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage (s). It is, indeed, a very delicate and difficult duty to be performed by such courts. Where the court has condescended to illustrate the generality of its statement of principle, it appears that the cases contemplated are those in which there has been a clear case of over-reaching. It must be remembered that the court attaches far more weight to the necessity of consent than to the strict performance of the conditions regarding its manifestation (t).

§ 257a. In general, a contract which contemplates a fraud upon third parties is regarded as so far illegal between the immediate parties, that neither will be entitled to claim the aid of a court of equity in its enforcement (u).

(o) *Bridgman v. Green*, 2 Ves. Sen. 627; *Huguénin v. Baseley*, 14 Ves. 289.

(p) *Luttrell v. Lord Waltham*, cited 14 Ves. 290; s.c. 11 Ves. 638.

(q) *Barrow v. Greenough*, 3 Ves. 152.

(r) See cases in note (a) to 3 Ves. 39.

(s) *Eastland v. Reynolds*, 1 Dick. 317; *Goldsmid v. Goldsmid*, 19 Ves. 368; *Clarke v. Parker*, 19 Ves. 1.

(t) *Blackwell v. Wood*, 1 L. J. N. S. Ch. 35; *Chapman v. Perkins*, [1905] A. C. 106.

(u) *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235; *Post v. Marsh*, 16 Ch. D. 395.

CHAPTER VII.

CONSTRUCTIVE FRAUD.

§ 258. HAVING thus considered some of the most important cases of actual or meditated and intentional fraud, in which courts of equity are accustomed to administer a plenary jurisdiction for relief, we may now pass to another class of frauds, which, as contradistinguished from the former, are treated as legal or constructive frauds. By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts, done *malo animo*. Although, at first view, the doctrines on this subject may seem to be of an artificial, if not of an arbitrary, character, yet, upon closer observation, they will be perceived to be founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice after a wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragements, which might otherwise be found too strong for their virtue.

§ 259. Some of the cases under this head are principally so treated, because they are contrary to some general public policy, or to some fixed artificial policy of the law. Others, again, rather grow out of some special confidential or fiduciary relation between all the parties, or between some of them, which is watched with especial jealousy and solicitude, because it affords the power and the means of taking undue advantage, or of exercising undue influence over others. And others, again, are of a mixed character, combining, in some degree, the ingredients of the preceding with others of a peculiar nature; but they are chiefly prohibited, because they operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons, or unconscientiously compromise or injuriously affect, the private interests, right, or duties of the parties themselves.

§ 260. And, in the first place, let us consider the cases of constructive fraud, which are so denominated on account of their being

contrary to some general public policy, or fixed artificial policy of the law (a). Among these may properly be placed contracts and agreements respecting marriage (commonly called marriage brokerage contracts), by which a party engages to give another a compensation if he will negotiate an advantageous marriage for him (b). The civil law does not seem to have held contracts of this sort in such severe rebuke; for it allowed *proxenetæ*, or matchmakers, to receive a reward for their services, to a limited extent (c).

§ 261. In this and the succeeding paragraph the learned author discussed various mischiefs which decisions in the House of Lords had prevented, and which it is no longer necessary to consider as being of practical importance after the lapse of two centuries.

§ 263. Be the foundation of the doctrine, however, what it may, it is now firmly established that all such marriage brokerage contracts are utterly void, as against public policy; so much so that they are deemed incapable of confirmation; and even money paid under them may be recovered back again (d). Nor will it make any difference that the marriage is between persons of equal rank and fortune and age, for the contract is equally open to objection upon general principles as being of dangerous consequence.

§ 264. The doctrine has gone even farther, and, with a view to suppress all undue influence and improper management, it has been held that a bond, given to the obligee as a remuneration for having assisted the obligor in an elopement and marriage without the consent of friends, is void, even though it is given voluntarily after the marriage, and without any previous agreement for the purpose; for it may operate an injury to the wife, as well as give encouragement to a grossly iniquitous transaction, calculated to disturb the peace of families, and to involve them in irremediable distress (e). It approaches, indeed, very nearly to the case of a premium in favour of seduction.

§ 265. Of a kindred nature, and governed by the same rules, are cases where bonds are given, or other agreements made, as a reward for using influence and power over another person, to induce him to make a will in favour of the obligor and for his benefit; for all such contracts tend to the deceit and injury of third persons, and encourage artifices and improper attempts to control the exercise of their free judgment (f). But such cases are carefully to be distinguished from

(a) See Mr. Cox's note to *Osmond v. Fitzroy*, 3 P. Will. 131. By being contrary to public policy we are to understand that, in the sense of the law, they are injurious to, or subversive of, the public interests. See *Chesterfield v. Janssen*, 1 Atk. 352; s.c. 2 Ves. Sen. 125.

(b) *Scribblehill v. Brett*, 4 Bro. P. C. 144; *Hermann v. Charlesworth*, [1905] 2 K. B. 123.

(c) Cod. Lib. 5, tit. 1, l. 6.

(d) *Hermann v. Charlesworth*, [1905] 2 K. B. 123.

(e) *Williamson v. Gihon*, 2 Sch. & Lefr. 356, 362.

(f) *Debenham v. Ox*, 1 Ves. Sen. 276.

those in which there is an agreement among heirs or other near relatives to share the estate equally between them, whatever may be the will made by the testator; for such an agreement is generally made to suppress fraud and undue influence, and cannot truly be said to disappoint the testator's intention, if he does not impose any restriction upon his devisee (*g*).

§ 266. Upon a similar ground, secret contracts made with parents or guardians, or other persons standing in a peculiar relation to the party, whereby, upon a treaty of marriage, they are to receive a compensation, or security, or benefit, for promoting the marriage, or giving their consent to it, are held void. They are in effect equivalent to contracts of bargain and sale of children and other relatives, and of the same public mischievous tendency as marriage brokerage contracts (*h*). They are underhand agreements, subversive of the due rights of the parties, and operating as a fraud upon those to whom they are unknown, and yet whose interests are controlled or sacrificed by them. And as marriages are of public concern and ought to be encouraged, so nothing can more promote this end than open and public agreements on marriage treaties, and the discountenance of all others which secretly impair them (*i*).

§ 267. Thus, where a bond was taken by a father from his son upon his marriage, it was held void, as being obtained by undue influence or undue parental awe (*k*). So, where a party upon his marriage with the daughter of A. gave the latter a bond for a sum of money (in effect a part of his wife's portion on the marriage), in order to obtain his consent to the marriage, it was held utterly void (*l*). So, where, upon a marriage, a settlement was agreed to be made of certain property by relations on each side, and, after the marriage, one of the parties procured an underhand agreement from the husband to defeat the settlement in part, it was set aside, and the original settlement carried into full effect (*m*). In all these and the like cases courts of equity proceed upon the broad and general ground that that which is the open and public treaty and agreement upon marriage shall not be lessened or in any way infringed by any private treaty or agreement (*n*). The latter is a meditated fraud upon innocent parties, and upon this account properly held invalid. But it has a higher foundation in the security which it is designed to throw round the

(*g*) *Harwood v. Tooke*, 2 Sim. 192; *Wethered v. Wethered*, 2 Sim. 183.

(*h*) *Keate v. Allen*, 2 Vern. 588; s.c. Prec. Ch. 267.

(*i*) *Roberts v. Roberts*, 3 P. Will. 74, and Mr. Cox's note (1); *Cole v. Gibson*, 1 Ves. Sen. 503.

(*k*) *Williamson v. Gihon*, 2 Sch. & Lefr. 362.

(*l*) *Keate v. Allen*, 2 Vern. 588; *Turton v. Benson*, Prec. Ch. 522.

(*m*) *Payton v. Bladwell*, 1 Vern. 240; *Stribblehill v. Brett*, 2 Vern. 445; Prec. Ch. 165.

(*n*) 1 Eq. Cas. Abr. 90, F. 5, 6.

contract of marriage, by placing all parties upon the basis of good faith, mutual confidence, and equality of condition (o).

§ 268. The same principle pervades the class of cases where persons, upon a treaty of marriage, by any concealment or misrepresentation, mislead other parties, or do acts which are by other secret agreements reduced to mere forms or become inoperative. In all cases of such agreements relief will, upon the same enlightened public policy, be granted to the injured parties. For equity insists upon principles of the purest good faith, and nothing could be more subversive of it than to allow parties, by holding out false colours, to escape from their own solemn engagements (p).

§ 269. Thus, where a parent declined to consent to a marriage with the intended husband, on account of his being in debt, and the brother of the latter gave a bond for the debt to procure such consent; and the intended husband then gave a secret counter-bond to his brother to indemnify him against the first, and the marriage proceeded upon the faith of the extinguishment of the debt, the counter-bond so given was treated as a fraud upon the marriage (*contra fidem tabularum nuptialium*), and all parties were held entitled as if it had not been given (pp).

§ 270. So, where the parent, upon a marriage of his son, made a settlement of an annuity or rent-charge upon the wife in full of her jointure, and the son secretly gave a bond of indemnity, of the same date, to his parent against the annuity or rent-charge, it was held void, as a fraud upon the faith of the marriage contract; for it affected to put the female party contracting for marriage in one situation by the articles, and, in fact, put her in another and worse situation by a private agreement (q). So, where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much as was insisted on by the other side, and the sister gave a bond to the brother to repay it, the bond was set aside (r).

§ 271. And where, upon a treaty of marriage, a party to whom the intended husband was indebted concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage, and the creditor was prevented by injunction from enforcing his debt, although it did not appear that there was any actual stipulation on the part of the wife's father in respect to the amount of the husband's debts (s). Upon this occasion Lord Chancellor Thurlow said: "The principle

(o) *Neville v. Wilkinson*, 1 Bro. C. C. 543, 547.

(p) *Neville v. Wilkinson*, 1 Bro. C. C. 543.

(pp) *Redman v. Redman*, 1 Vern. 348.

(q) *Palmer v. Neave*, 11 Ves. 165.

(r) *Gale v. Lindo*, 2 Vern. 475; *Lamlee v. Hanman*, 2 Vern. 499.

(s) *Neville v. Wilkinson*, 1 Bro. C. C. 543.

on which all these cases have been decided is, that faith in such contracts is so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion shall not only not gain, but even lose by it. Nay, he shall be obliged to make his representation good, and the parties shall be placed in the same situation as if he had been scrupulously exact in the performance of his duty."

§ 272. In all these cases, and those of a like nature, the distinct ground of relief is a meditated fraud or imposition practised by one of the parties upon third persons by intentional concealment or misrepresentation. And, therefore, if the parties act under a mutual innocent mistake, and with entire good faith, the concealment or misrepresentation of a material fact will not induce the court to compel the party concealing it or affirming it to make it good, or to place the other party in the same situation as if the fact were as the latter supposed. There must be some ingredient of fraud, or some wilful misstatement or concealment, which has misled the other side.

§ 273. Upon a similar ground a settlement, secretly made by a woman in contemplation of marriage, of her own property to her own separate use without her intended husband's privity, was held to be void, as being in derogation of the marital rights of the husband, and a fraud upon his just expectations (t). But it would seem that the effect of the Married Women's Property Act, 1882, and of the amending statute of 1907, has been to abolish the whole doctrine of fraud on marital rights.

§ 274. It is upon the same ground of public policy that contracts in restraint of marriage are held void (u). A reciprocal engagement between a man and a woman to marry each other is unquestionably good (x). But a contract which restrains a person from marrying at all, or from marrying anybody, except a particular person, without enforcing a corresponding reciprocal obligation on that person, is treated as mischievous to the general interests of society, which are promoted by the encouragement and support of suitable marriages (y). Courts of equity have in this respect followed, although not to an unlimited extent, the doctrine of the civil law, that marriage ought to be free (z).

§ 275. Where, indeed, the obligation to marry is reciprocal, although the marriage is to be deferred to some future period, there may not be, as between the parties, any objection to the contract in itself, if in all other respects it is entered into in good faith, and there

(t) *Countess of Strathmore v. Bowes*, 1 Ves. Jun. 22; *affd. nom. Bowes v. Bowes*, 6 Bro. P. C. 427; *England v. Downs*, 2 Beav. 522.

(u) *Hartley v. Rice*, 10 East 22.

(x) *Cook v. Baker*, 1 Stra. 34; *Cock v. Richards*, 10 Ves. 438.

(y) *Lowe v. Peers*, 4 Burr. 2225; *Cock v. Richards*, 10 Ves. 429.

(z) Dig. Lib. 35, tit. 1, ff 62, 63, 64; *Key v. Bradshaw*, 2 Vern. 102.

is no reason to suspect fraud, imposition, or undue influence (a). But, even in these cases, if the contract is designed by the parties to impose upon third persons, as upon parents, or friends standing *in loco parentis*, or in some other particular relation to the parties, so as to disappoint their bounty, or to defeat their intentions in the settlement or disposal of their estates; there, if the contract is clandestine, and kept secret for this purpose, it will be treated by courts of equity as a fraud upon such parents or other friends, and as such be set aside; or the equities will be held the same as if it had not been entered into (b). The general ground upon which this doctrine is sustained is that parents and other friends, standing *in loco parentis*, are thereby induced to act differently in relation to the advancement of their children and relatives from what they would if the facts were known; and the best influence which might be exerted in persuading their children and relatives to withdraw from an unsuitable match is entirely taken away. To give effect to such contracts would be an encouragement to persons to lie upon the watch to procure unequal matches against the consent of parents and friends, and to draw on improvident and clandestine marriages, to the destruction of family confidence, and the disobedience of parental authority (c). These are objects of so great importance to the best interests of society that they can scarcely be too deeply fixed in the public policy of a nation, and especially of a Christian nation.

§ 276. In the civil law a strong desire was manifested to aid in the establishment of marriages, as has been already intimated (d). And hence, all conditions annexed to gifts, legacies, and other valuable interests, which went to restrain marriages generally, were deemed inconsistent with public policy, and held void. A gift, therefore, to a woman, of land, if she should not marry, was held an absolute gift. “*Mæviæ, si non nupserit, fundum quum morietur, lego; potest dici, et si nupserit, eam confestim ad legatum admitti (e). Si testator rogasset hæredem, ut restituat hæreditatem mulieri, si non nupsisset; dicendum erit compellendum hæredem, si suspectam dicat hæreditatem, adire et restituere eam mulieri, etiam si nupsisset*” (f). So, a gift to a father, if his daughter, who is under his authority (*in potestate*), should not marry, was treated as an absolute gift; the condition being held void (g). The avowed ground of these decisions was, that all such conditions were a fraud upon the law which favoured

(a) *Lowe v. Peers*, 4 Burr. 2229, 2230; *Key v. Bradshaw*, 2 Vern. 102; *Frost v. Knight*, L. R. 7 Ex. 111.

(b) *Cock v. Richards*, 10 Ves. 429.

(c) *Woodhouse v. Shepley*, 2 Atk. 539; *Cock v. Richards*, 10 Ves. 438, 539.

(d) *Ante*, § 260.

(e) Pothier, Pand. Lib. 35, tit. 1, n. 33; Dig. Lib. 35, tit. 1, f. 72, § 5.

(f) Pothier, Pand. Lib. 35, tit. 1, n. 33; Dig. Lib. 36, tit. 1, f. 65, § 1.

(g) Pothier, Pand. Lib. 35, tit. 1, n. 35.

marriage; “*Quod in fraudem legis ad impediendas nuptias scriptum est, nullam vim habet*” (h).

§ 277. But a distinction was taken in the civil law between such general restraints of marriage, and a special restraint, as to marrying or not marrying a particular person; the latter being deemed not unjustifiable. Thus, a gift, upon condition that a woman should not marry Titius, or not marry Titius, Seius, or Mævius, was held valid (i). And the distinction was in some cases even more refined; for, if a legacy was given to a wife upon condition that she should not marry while she had children (*si a liberis, ne nupserit*), the condition was nugatory; but, if it was that she should not marry while she had children in puberty (*si a liberis impuberibus ne nupserit*), it was good (k). And the reason given is that the care of children, rather than widowhood, might be enjoyed; “*Quia magis cura liberorum, quam viduitas, injungeretur*” (l).

§ 278. Courts of equity, in acting upon cases of a similar nature, have been in no small degree influenced by these doctrines of the civil law. But it has been doubted whether the same grounds upon which the Roman law acted can or ought to be acted on in a Christian country, under the common law. Lord Rosslyn has endeavoured to account for the introduction of these doctrines into English courts of equity from the desire of the latter to adopt, upon legatory questions, the rules of the ecclesiastical courts, which were borrowed directly from the civil law. And speaking upon the subject of the rule of the civil law, as to conditions in restraint of marriage, he said (m): “How it should ever have come to be a rule of decision in the ecclesiastical court is impossible to be accounted for, but upon this circumstance, that, in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned; but only looked into the books and transferred the rules without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a Christian country, they should have adopted the rule of the Roman law with regard to conditions as to marriage. First, where there is an absolute, unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law, where divorce is not permitted. Next, the favour to marriage, and the objection to the restraint of it, were a mere political regulation, applicable to the circumstances of the Roman empire at that time, and inapplicable to other countries. After the civil war, the depopulation occasioned by it led to habits of celibacy. In the time of

(h) Ibid. Lib. 35, tit. 1, n. 35; Dig. Lib. 35, tit. 1, f. 79, § 4.

(i) Pothier, Pand. Lib. 35, tit. 1, n. 34; Dig. Lib. 35, tit. 1, f. 63, 64.

(k) Pothier, Pand. Lib. 35, tit. 1, n. 34; Dig. Lib. 35, tit. 1, f. 62, § 2.

(l) Pothier, Pand. Lib. 35, tit. 1, n. 34.

(m) *Stackpole v. Beaumont*, 3 Ves. 96.

Augustus, the Julian law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established, as a rule in restraint of celibacy (it is an odd expression), and for the encouragement of all persons who would contract marriage, it necessarily followed, that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore, it became a rule of construction, that these conditions were null. It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion, as to the time and circumstances of the marriage which their children, or objects of bounty, may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine, not to lay conditions to restrain marriage under the age of twenty-one, to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one, without the consent of the parent."

§ 279. It is highly probable that this view of the origin of the English doctrine, as to conditions in restraint of marriage, annexed to gifts, legacies, and other conveyances of interests, is historically correct. But, whether it be so or not, it may be affirmed, without fear of contradiction, that the doctrine on this subject, at present maintained and administered by courts of equity (for it has undergone some important changes), is far better adapted to the exigencies of modern society throughout Christendom, than that which was asserted by the Roman law. While it upholds the general freedom of choice in marriages, it at the same time has a strong tendency to preserve a just control and influence in parents, in regard to the marriage of their children, and a reasonable power in all persons to qualify and restrict their bounty in such a manner, and on such conditions, as the general right of dominion over property in a free country justifies and protects, upon grounds of general convenience and safety.

§ 280. The general result of the modern doctrine on this subject (for it is impossible to reconcile all the cases) may be stated in the following summary manner. Conditions annexed to gifts, legacies, and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage (*n*). If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void (*o*). And so, if the condition is not

(*n*) *Scott v. Tyler*, 2 Bro. C. C. 487; 2 Dick. 718; *Stackpole v. Beaumont*, 3 Ves. 95.

(*o*) *Morley v. Rennoldson*, 2 Hare 570; [1895] 1 Ch. 449.

in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration (*p*). Thus, where a legacy was given to a daughter, on condition that she should not marry without consent, or should not marry a man who was not seised of an estate in fee-simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage (*q*).

§ 281. But the same principles of public policy which annul such conditions, when they tend to a general restraint of marriage, will confirm and support them when they merely prescribe such reasonable and provident regulations and sanctions as tend to protect the individual from those melancholy consequences to which an over-hasty, rash, or precipitate match would probably lead. If parents, who must naturally feel the deepest solicitude for the welfare of their children, and other near relatives and friends, who may well be presumed to take a lively interest in the happiness of those with whom they are associated by ties of kindred, or friendship, could not, by imposing some restraints upon their bounty, guard the inexperience and ardour of youth against the wiles and delusions of the crafty and the corrupt, who should seek to betray them from motives of the grossest selfishness, the law would be lamentably defective, and would, under the pretence of upholding the institution of marriage, subvert its highest purposes. It would, indeed, encourage the young and the thoughtless to exercise a perfect freedom of choice in marriage; but it would be at the expense of all the best objects of the institution, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality, and filial obedience and reverence. Such a reproach does not belong to the common law in our day; and, least of all, can it be justly attributed to courts of equity.

§ 282. Mr. Fonblanque has, with great propriety, remarked: "The only restrictions which the law of England imposes, are such as are dictated by the soundest policy, and approved by the purest morality. That a parent, professing to be affectionate, shall not be unjust; that, professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that what purports to be an act of generosity shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to restrain from doing that which would serve and promote the essential interests of society; [these] are rules which cannot reasonably be reprobated as harsh infringements of

(*p*) *Keily v. Monck*, 3 Ridgw. Parl. 205.

(*q*) *Ibid.*

private liberty, or even reproached as unnecessary restraints on its free exercise. On these considerations are founded those distinctions which have from time to time been recognized in our courts of equity, respecting testamentary conditions with reference to marriage" (r).

§ 283. Godolphin also has very correctly laid down the general principle. "All conditions against the liberty of marriage are unlawful. But, if the conditions are only such, as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect to time, place, or person, then such conditions are not utterly to be rejected" (s). Still, this language is to be understood with proper limitations; that is to say, that the restraints upon marriage, in respect to time, place, or person, are reasonably asserted. For it is obvious that restraints as to time, place, and person may be so framed as to operate a virtual prohibition upon marriage, or, at least, upon its most important and valuable objects. As, for instance, a condition that a child should not marry until fifty years of age; for this would be deemed a mere evasion or fraud upon the law (t).

§ 284. On the other hand, some provisions against improvident matches, especially during infancy, or until a certain age of discretion, cannot be deemed an unreasonable precaution for parents and other persons to affix to their bounty. Thus a legacy given to a daughter to be paid her at twenty-one years of age, if she does not marry until that period, would be held good, for it postpones marriage only to a reasonable age of discretion (u). So, a condition, annexed to a gift or legacy, that the party should not marry without the consent of parents or trustees, or other persons specified, is held good; for it does not impose an unreasonable restraint upon marriage; and it must be presumed that the person selected will act with good faith and sound discretion in giving or withholding consent (x). The civil law, indeed, seems, on this point, to have adopted a very different doctrine; holding that the requirement of the consent of a third person, and especially of an interested person, is a mere fraud upon the law (y).

§ 285. Other cases have been stated, which are governed by the same principles. Thus, a condition restraining marriage with a domestic servant is not in general restraint of marriage (z). So, a condition that a widow or widower shall not re-marry, is not unlawful, neither is an annuity during widowhood only (a). A condition to marry,

(r) Fonbl. Eq. B. 1, ch. 4, § 10, note (g).

(s) Godolphin's Orphan's Legacy, Pt. 1, ch. 15, § 1.

(t) See *Scott v. Tyler*, 2 Dick. 721, 722; 2 Bro. C. C. 488.

(u) *Scott v. Tyler*, 2 Bro. C. C. 431.

(x) *Clarke v. Parker*, 19 Ves. 1; *Lloyd v. Branton*, 3 Mer. 108; *Chapman v. Perkins*, [1905] A. C. 106.

(y) Lord Thurlow, in *Scott v. Tyler*, 2 Dick. 728; Ayliffe, Pand. B. 3, tit. 21, p. 374.

(z) *Jenner v. Turner*, 16 Ch. D. 188.

(a) *Newton v. Marsden*, 2 J. & H. 356; *Evans v. Rosser*, 2 H. & M. 190; *Allen v. Jackson*, 1 Ch. D. 399.

or not to marry, Titius or Mævia, is good. So a condition, prescribing due ceremonies and a due place of marriage, is good. And so any other conditions of a similar nature, if not used evasively, as a covert purpose to restrain marriage generally (b). And on the same general principle, a condition that the legatee shall not become a nun is valid; and although the will contain no bequest over, the legacy is forfeited if the legatee does become a nun (c).

§ 286. But courts of equity are not generally inclined to lend an indulgent consideration to conditions in restraint of marriage (d); and on that account (being in no small degree influenced by the doctrines of the civil and canon law), they have not only constantly manifested an anxious desire to guard against any abuse, to which the giving of one person any degree of control over another might eventually lead; but they have, on many occasions, resorted to subtleties and artificial distinctions, in order to escape from the positive directions of the party imposing such conditions.

§ 287. One distinction is, between cases where, in default of a compliance with the condition, there is a bequest over, and cases where there is not a bequest over, upon a like default of the party to comply with the condition. In the former case, the bequest over becomes operative upon such default, and defeats the prior legacy (e). In the latter case (that is, where there is no bequest over), the condition is treated as ineffectual, upon the ground that the testator is to be deemed to use the condition *in terrorem* only, and not to impose a forfeiture, since he has failed to make any other disposition of the bequest upon default in the condition (f). There is an intermediate class which had not been discussed in any decision when the author wrote, namely, of a gift terminating on marriage, and operating by way of conditional limitation. Gifts of this character cease upon marriage (g).

§ 288. In the case of conditions in restraint of marriage, annexed to a devise of real estate, or to a charge on real estate, or to things savouring of the realty, the doctrine of the common law, as to conditions, is strictly applied. If the condition be precedent, it must be strictly complied with, in order to entitle the party to the benefit of

(b) *Scott v. Tyler* 2 Bro. C. C. 488; 2 Dick. 721, 722; *Haughton v. Haughton*, 1 Moll. 611.

(c) *In re Dickson*, 1 Sim. N. S. 37.

(d) See *Long v. Dennis*, 4 Burr, 2052. Lord Mansfield, in *Long v. Dennis*, 4 Burr. 2055, said, "Conditions in restraint of marriage are odious, and are, therefore, held to the utmost rigour and strictness." Lord Eldon seems to have disapproved of this generality of expression, in *Clarke v. Parker*, 19 Ves. 19.

(e) *In re Whiting's Settlement*; *Whiting v. De Rutzen*, [1905] 1 Ch. 96. Where the condition of a devise was the giving of a bond not to marry or cohabit with certain persons, with a devise over, the court refused to enforce the condition, as tending to inquiries disturbing the peace of another family. *Poole v. Bott*, 11 Hare 33.

(f) *Marples v. Bainbridge*, 1 Mad. 590.

(g) *Webb v. Grace*, 2 Ph. 710; *Heath v. Lewis*, 3 De G. M. & G. 954.

the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to divest an estate. For, if the law deems the condition void as against its own policy, then the estate will be absolute and free from the condition. If, on the other hand, the condition is good, then a non-compliance with it will defeat the estate, in the same manner as any other condition subsequent will defeat it (*h*).

§ 289. If the bequest be of personal estate, and the condition in restraint of marriage be subsequent and general in its character, it is treated as the like condition is at law, in regard to real estate, as a mere nullity, and the legacy becomes pure and absolute (*i*). If it be only a limited restraint (such as to a marriage with the consent of parents, or not until the age of twenty-one), and there is no bequest over upon default, the condition subsequent is treated as merely *in terrorem*, and the legacy becomes pure and absolute (*k*). According to the more recent cases, if the restraint be a condition precedent, and be in general restraint of marriage, there, although it is void, if there is not a compliance with it, the estate will never arise in the legatee (*l*).

§ 291. But there is a modification of the strictness of the common law, as to conditions precedent in regard to personal legacies, which is at once rational and convenient, and promotive of the real intention of the testator. It is, that, where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any default of the party, it is sufficient that it is complied with, as nearly as it practically can be, or (as it is technically called) *cy-près*. This modification is derived from the civil law, and stands upon the presumption, that the donor could not intend to require impossibilities, but only a substantial compliance with his directions, as far as they should admit of being fairly carried into execution. It is upon this ground that courts of equity constantly hold, in cases of personal legacies, that a substantial compliance with the condition satisfies it, although not literally fulfilled. Thus if a legacy upon a condition precedent of the consent of the testator to a marriage, and a marriage should take place in his lifetime without his disapproval (*m*), or should require the consent of three persons to a marriage, and one or more of them should die, the consent of the survivor or survivors would be deemed a sufficient compliance with condition (*n*). And

(*h*) Co. Litt. 206 *a* and *b*; id. 217 *a*; id. 237, Harg & Butler's note (152); *Harvey v. Aston*, 1 Atk. 361; *Lowe v. Peers*, 4 Burr. 2225; *Long v. Ricketts*, 2 Sim. & Stu. 179.

(*i*) *Morley v. Rennoldson*, 2 Hare 570; [1895] 1 Ch. 449.

(*k*) *Lloyd v. Branton*, 3 Meriv. 117; *Marples v. Bainbridge*, 1 Mad. 590.

(*l*) *Morgan v. Morgan*, 4 De G. & Sm. 164; *In re Brown's Will*, 18 Ch. D. 61.

(*m*) *Chapman v. Perkins*, [1905] A. C. 106.

(*n*) *Clarke v. Parker*, 19 Ves. 1; *Worthington v. Evans*, 1 Sim. & Stu. 165.

a fortiori, this doctrine would be applied to conditions subsequent (o).

§ 291. The topic just discussed, although widely sundered from what we should now regard as fraud, suggests conditions annexed to a gift, the tendency of which is to induce husband and wife to live separate, or be divorced, and these upon grounds of public policy and public morals, are held void (p). In *Wren v. Bradley* (q), an annuity was bequeathed to a daughter, a married woman, "in case she should be living apart from her husband, and should continue to do so" during the life of the testator's widow, which annuity was to cease whenever the annuitant should cohabit with her husband; the will also contained a residuary trust, the income of which was to be paid to the daughter, during such time as she should continue to live apart from her husband; but directed that, whenever she should cohabit with her husband, such income should be paid to other legatees; and further contained a trust for the children of the daughter, by any other husband. The daughter and her husband were living apart at the date of the will, but had become reconciled, and were living together at the death of the testator and subsequently: it was held that the daughter was entitled to the benefit of all the provisions of the will in her favour. The Vice-Chancellor, Knight-Bruce, said, in giving judgment: "It is impossible to read the will without perceiving that the testator's wish and object were to obstruct a reconciliation, and prevent the wife from living with her husband. And that, by that wish, by that object, its provisions to her were influenced and directed. The weight of authority and the principles of the civil law, as far as I consider them applicable, seem to me to render a decision in this case, in the daughter's favour, consistent at once with technical equity and moral justice." Here, too, common sense prevails. If the object is not to bring about a separation, but to make a provision for a spouse pending a separation, the condition would be valid (r).

§ 292. Another class of constructive frauds, and so deemed because inconsistent with the general policy of the law, is that of bargains and contracts made in restraint of trade. Formerly contracts in general restraint of trade were held to be *ipso facto* invalid, but according to the most recent decisions, a provision appointing a world-wide restraint upon the employment of personal services is not invalid, if justified by the circumstances, to determine which regard must be had to the respective interests of the parties to the contract, and of

(o) *Aislabie v. Rice*, 3 Mad. 256.

(p) *Marq. of Westmeath v. Marq. of Salisbury*, 5 Bli. N. S. 339; *Cartwright v. Cartwright*, 3 De G. M. & G. 982; *In re Moore*, *Trafford v. Maconochie*, 39 Ch. D. 116.

(q) *Wren v. Bradley*, 2 De G. & Sm. 49.

(r) *Jones v. Waite*, 5 Bing. N. C. 341; 9 Cl. & F. 101; *In re Hope Johnstone*, [1904] 1 Ch. 470; *Harrison v. Harrison*, [1910] 1 K. B. 35.

the public (s). And a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret (t).

§ 293. The common law required that sales by auction should be conducted upon principles of free competition. Unless the seller reserved a right to bid, he could not run up the price by himself or his agent, commonly called a puffer (u); and, conversely, a prospective buyer was not entitled to damp the sale (x). In equity the converse rule obtained in favour of seller (y) or buyer (z). But by the "Sale of Land by Auction Act," 1867 (30 & 31 Vict. c. 48), it is enacted that all sales of land where a puffer has bid shall be void, unless a right of bidding on behalf of the owner shall have been reserved, and that the conditions of sale shall state whether the sale is to be without reserve or subject to a reserved price, or whether a right to bid is reserved; that if it be stated that the sale is to be without reserve, a puffer is not to be employed; that if a right of bidding be reserved, the seller or one puffer may bid. And these provisions have lately been extended to sales of goods by auction by Section 58 of the Sale of Goods Act, 1893.

§ 294. In like manner, agreements, which are founded upon violations of public trust or confidence, or of the rules adopted by courts in furtherance of the administration of public justice, are held void. Thus, an assignment of the full or half-pay of a retired officer of the army or other public officer is void; for it operates as a fraud upon the public bounty (a). So, a corrupt bargain by a member of the legislature to turn his position to pecuniary account would be invalid, although there would be no objection to his making a bargain in reference to his property, using his position as a lever to obtain favourable terms (b). Agreements, founded upon the suppression of criminal prosecutions, fall under the same consideration. They have a manifest tendency to subvert public justice (c). So, wager contracts, if contrary to sound morals, or injurious to the feelings or interests of third persons, or against the principles of public policy or duty, are void at the common law, and the general legality of wagers at the common law has been restricted by statute (d). So, of contracts to enable a

(s) *Nordenfeldt v. Maxim Nordenfeldt Guns & Ammunition Co.*, [1894] A. C. 535; *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 724; *Morris, Lim. v. Saxelby*, [1915] A. C. 688.

(t) *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Hagg v. Darley*, 47 L. J. Ch. 567.

(u) *Howard v. Castle*, 6 L. R. 642; *Crowder v. Austin*, 3 Bing. 368.

(x) *Fuller v. Abrahams*, 6 Moo. 316.

(y) *Smith v. Clarke*, 12 Ves. 477.

(z) *In re Carew's Estate*, 26 Beav. 197; *Heffer v. Martyn*, 36 L. J. Ch. 372.

(a) *Stone v. Littledale*, 2 Anst. 533; *Davis v. Duke of Marlborough*, 1 Swanst. 74; *Ex parte Huggins*, 21 Ch. D. 91.

(b) *Simpson v. Lord Howden*, 3 M. & Cr. 97; 9 Cl. & F. 61.

(c) *Lound v. Grimwade*, 39 Ch. D. 605; *Windhill Loc. Bd. v. Vint*, 45 Ch. D. 351; *Jones v. Merionette Building Soc.*, [1892] 1 Ch. 173; *Consolidated Exploration & Finance Co. v. Musgrave*, [1900] 1 Ch. 37.

(d) *Ramloll v. Soojumnul*, 6 Moo. P. C. 300; *Read v. Anderson*, 10 Q. B. D. 100.

person to violate the licence laws (*e*). So are contracts which have a tendency to encourage champerty (*f*).

§ 295. Another extensive class of cases, falling under this head of constructive fraud, respects contracts for the buying, selling, or procuring of public offices. It is obvious that all such contracts must have a material influence to diminish the respectability, responsibility, and purity of public officers, and to introduce a system of official patronage, corruption, and deceit wholly at war with the public interests. The confidence of officers may thereby not only be abused and perverted to the worst purposes, but mischievous arrangements may be made to the injury of the public; and persons may be introduced or kept in office who are utterly unqualified to discharge the proper functions of their stations. Such contracts are justly deemed contracts of moral turpitude; and are calculated to betray the public interests into the administration of the weak, the profligate, the selfish, and the cunning. They are, therefore, held utterly void, as contrary to the soundest public policy, and, indeed, as a constructive fraud upon the government (*g*). It is acting against the spirit of the constitution of a free government, by which it ought to be served by fit and able persons, recommended by the proper officers of the government for their abilities, and from motives of disinterested purity (*h*). It has been strongly remarked that there is no rule better established (it should be added, in law and reason, for, unfortunately, it is often otherwise in practice), respecting the disposition of every office in which the public are concerned, than this, *detur digniori*. On principles of public policy, no money consideration ought to influence the appointment to such offices (*i*). It was observed of old, that the sale of offices accomplished the ruin of the Roman Republic: “Nullâ aliâ re magis Romana Respublica interiit, quam quod magistratûs officia venalia erant” (*k*).

§ 296. Another class of agreements, which are held to be void on account of their being against public policy, are such as are founded upon corrupt considerations or moral turpitude, whether they stand prohibited by statute or not; for these are treated as frauds upon the public or moral law. The rule of the civil law on this subject speaks but the language of universal justice: “Pacta, quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est” (*l*). It is but applying a preventive check, by withholding every encouragement from wrong, and aiming thereby

(*e*) *Ritchie v. Smith*, 6 C. B. 462.

(*f*) *Reynell v. Sprye*, 1 De G. M. & G. 660; *Rees v. De Bernady*, [1896] 2 Ch. 437; *Holding v. Thompson*, [1907] 2 K. B. 489.

(*g*) *Hanington v. Du Chastel*, 1 Bro. C. C. 124; *Thomson v. Thomson*, 7 Ves. 470. See *Hill v. Paul*, 8 Cl. & F. 295.

(*h*) *Morris v. MacCulloch*, 2 Eden 190.

(*i*) Lord Kenyon in *Bachford v. Preston*, 8 T. R. 92.

(*k*) Cited Co. Litt. 334 a.

(*l*) Cod. Lib. 2, tit. 3, f. 6.

to enforce the obligations of virtue. For, although the law, as a science, must necessarily leave many moral precepts without due enforcement, as rules of imperfect obligation only, it is most studious not thereby to lend the slightest countenance to the violations of such precepts. Wherever positive law, or the common law, or, it has been said, the divine law prohibits the doing of certain acts, or enjoins the discharge of certain duties, any agreement to do such acts, or not to discharge such duties, is against the dearest interests of society, and, therefore, is held void; for, otherwise, the law would be open to the just reproach of winking at crimes and omissions, or tolerating in one form what it affected to reprobate in another. Hence, all agreements, bonds, and securities, given as a price for future illicit intercourse (*præmium pudoris*), or for the commission of a public crime, or for the violation of a public law, or for the omission of a public duty, are deemed incapable of confirmation or enforcement upon the maxim, *Ex turpi contractu non oritur actio* (*m*). An agreement not under seal for any of the above purposes would be unenforceable at law and in equity for want of a consideration (*n*). Illegality being a matter of allegation and proof, a continued illicit cohabitation does not warrant the inference that a security was given to attain that object, *omnia rite esse acta presumuntur* (*o*).

§ 297. Other cases might be put to illustrate the doctrine of courts of equity in setting aside the agreements and acts in fraud of the policy of the law. Thus, where a parent conveyed land to his son to qualify him to kill game, he was not permitted to avoid the conveyance (*p*). So, a person cannot recall a conveyance of property to a party with whom he is living in adultery (*q*). And other illustrations might be put chosen from decided cases which are now wholly or largely obsolete (*r*).

§ 298. And here it may be well to take notice of a distinction often, but not universally, acted on in courts of equity as to the nature and extent of the relief which will be granted to persons who are parties to agreements or other transactions against public policy, and therefore are to be deemed *participes criminis*. In general (for it is not universally true), where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators

(*m*) *Walker v. Perkins*, 3 Burr. 1568; *Gray v. Mathias*, 5 Ves. 286; *Kearley v. Thomson*, 24 Q. B. D. 742; *Consolidated Exploration & Finance Co. v. Musgrave*, [1900] 1 Ch. 37.

(*n*) *Beaumont v. Reeve*, 8 Q. B. 483. See *Kekewich v. Manning*, 1 De G. M. & G. 176.

(*o*) *In re Vallance*, *Vallance v. Blagdon*, 26 Ch. D. 353.

(*p*) *Brackenbury v. Brackenbury*, 2 J. & W. 391.

(*q*) *Ayerst v. Jenkins*, L. R. 16 Eq. 282.

(*r*) *Wallis v. Duke of Portland*, 3 Ves. 294; *Stevens v. Bagwell*, 15 Ves. 139.

in a common crime (s), will not interpose to grant any relief; acting upon the known maxim, *In pari delicto potior est conditio defendentis, et possidentis* (t). But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance, that the relief is asked by a party who is *particeps criminis*, is not in equity material. The reason is, that the public interest requires that relief should be given, and it is given to the public through the party (u). And in these cases relief will be granted not only by setting aside the agreement or other transaction, but also, in many cases, by ordering a repayment of any money paid under it. Lord Thurlow, indeed, seems to have thought that, in all cases where money had been paid for an illegal purpose, it might be recovered back, observing that if courts of justice mean to prevent the perpetration of crimes, it must be, not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before. But this is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, *In pari delicto potior est conditio defendentis*. The ground of reasoning upon which his lordship proceeded is exceedingly questionable in itself; and the suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check, naturally connected with a want of confidence, and a sole reliance upon personal honour. And so, accordingly, the modern doctrine is established (x). Relief is not granted where both parties are truly *in pari delicto*, unless in cases where public policy would thereby be promoted (y).

§ 299. Even in cases of a *præmium pudicitæ*, the distinction has been constantly maintained between bills for restraining the woman from enforcing the security given, and bills for compelling her to give up property already in her possession under the contract. At least there is no case to be found, where the contrary doctrine has been acted on, except where creditors were concerned. And in this respect English law seems to have had a steady regard to the policy of the Roman jurisprudence (z).

(s) Bull, N. P. 131, 132.

(t) *Osborne v. Williams*, 18 Ves. 379; *In re Great Berlin Steamboat Co.* 26 Ch. D. 616; *Kearley v. Thomson*, 24 Q. B. D. 742.

(u) *Williams v. Bayley*, L. R. 1 H. L. 200; *Jones v. Merioneth Permanent Building Society* [1892] 1 Ch. 173; *Martin v. Tomkinson*, [1893] 2 Q. B. 121.

(x) See *Sharp v. Taylor*, 2 Ph. 801.

(y) See the remarks of Fry, L.J., *Kearley v. Thomson*, 24 Q. B. D. 742.

(z) *Rider v. Kidder*, 10 Ves. 366; *Ayerst v. Jenkins*, L. R. 16 Eq. 282. The Roman law has stated some doctrines and distinctions upon this subject, which are worthy of consideration. I shall quote them without commenting upon them. Three cases are put. (1) Where the turpitude is on the part of the receiver only; and there the rule is, *Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest*. Dig. Lib. 12, tit. 5, f. 1, § 2. (2) Where the turpitude is on the part of the giver alone; and there the rule is the contrary. *Cessat quidem conditio, quum turpiter*

§ 300. And, indeed, in cases where both parties are *in delicto*, concurring in an illegal act, it does not always follow, that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt (a). One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence. And, besides, there may be, on the part of the court itself, a necessity of supporting the public interests or public policy, in many cases, however reprehensible the acts of the parties may be (b).

§ 301. In cases of usury, this distinction had been adopted by courts of equity before the repeal of the statutes against usury by the 17 & 18 Vict. c. 90. While the statutes were in existence courts of equity followed the law in the construction of the statute. If, therefore, the usurer or lender came into a court of equity, seeking to enforce the contract, the court would refuse any assistance, and repudiate the contract. But, on the other hand, if the borrower came into a court of equity, seeking relief against the usurious contract, the only terms upon which the court would interfere, were, that the plaintiff would pay the defendant what was really and *bonâ fide* due to him, deducting the usurious interest, and, if the plaintiff did not make such offer in his bill, the defendant might demur to it, and the bill would be dismissed (c). The ground of this distinction was, that a court of equity was not positively bound to interfere in such cases by an active exertion of its powers; but it had a discretion on the

datur. Pothier, Pand. Lib. 12, tit. 5, art. 8. (3) Where the turpitude affects both parties, and there the rule is, *Ubi autem et dantis et accipientis turpitudine versatur, non posse repeti dicimus; veluti, si pecunia detur, ut male judicetur.* Dig. Lib. 12, tit. 5, f. 3; Pothier, Pand. Lib. 12, tit. 5, n. 7. The reason given is: *In pari causa possessor potior haberi debet.* Dig. Lib. 50, tit. 17, f. 128; Pothier, Pand. Lib. 12, tit. 5, n. 7. Several other examples are given under this head. *Idem, si ob stuprum datum sit; vel si quis, in adulterio reprehensus, redemerit se, cessat enim repetitio.* Item, *so dederit fur, ne proderetur; quoniam utriusque turpitudine versatur, cessat repetitio.* Dig. Lib. 12, tit. 5, f. 4; Pothier, Pand. Lib. 12, tit. 5, n. 7. *Cum te propter turpem causam contra disciplinam temporum meo rum, domum adversariæ dedisse profitearis; frustra eam tibi resitui desideras; cum in pari causa possessoris conditio melior habeatur.* Cod. Lib. 4, tit. 7, l. 2; Pothier, Pand. Lib. 12, tit. 5, l. 7. *Sed quod meretrici datur, repeti non potest. Sed nova ratione, non ea, quod utriusque turpitudine versatur, sed solius dantis; a new reason, which Pothier, as well as Ulpian, seems to doubt.* See Dig. Lib. 12, tit. 5, f. 4, § 3; Pothier, Pand. Lib. 12, tit. 5, n. 7, and note (6). On the other hand, when the money had not been paid, or the contract fulfilled, the Roman law deemed the contract void. *Quamvis enim utriusque turpitudine versatur, ac solutæ quantitatis cessat repetitio, tamen ex hujusmodi stipulatione, contra bonos mores interposita, denegandas esse actiones juris auctoritate demonstratur.* Cod. Lib. 4, tit. 7, l. 5; Pothier, Pand. Lib. 12, tit. 5, n. 9.

(a) *Osborne v. Williams*, 18 Ves. 379.

(b) *Osborne v. Williams*, 18 Ves. 379; *Osbaldiston v. Simpson*, 13 Sim. 513; *Williams v. Bayley*, L. R. 1 H. L. 200; *Jones v. Merioneth Building Soc.*, [1892] 1 Ch. 173.

(c) *W—— v. B——*, 32 Beav. 574; *Davies v. Otty*, 35 Beav. 208; *Mason v. Gardiner*, 4 Bro. C. C. 436.

subject, and might prescribe the terms of its interference; and he who seeks equity at its hands, may well be required to do equity. And it was considered against conscience, that the party should have full relief, and at the same time pocket the money lent, which may have been granted at his own mere solicitation (*d*). For then a statute, made to prevent fraud and oppression, would be made the instrument of fraud. But, in the other case, if equity had relieved the lender, who was plaintiff, it would have been aiding a wrongdoer, who was seeking to make the court the means of carrying into effect a transaction manifestly wrong and illegal in itself.

§ 302. And, upon the like principles, if the borrower had paid the money upon an usurious contract, courts of equity (as, indeed, have also courts of law) (*e*), would assist him to recover back the excess paid beyond principal and lawful interest; but not further. For it is no just objection to say, that he is *particeps criminis*, or that *Volenti non fit injuria*. It would be absurd to apply the latter maxim to the case of a man who, from mere necessity, pays more than the other can in justice demand, and who has been significantly called the slave of the lender. He can in no just sense be said to pay voluntarily. And as to being *particeps criminis*, he stands in *vinculis*, and is compelled to submit to the terms which oppression and his necessities impose on him (*f*). Nor can it be said, in any case of oppression, that the party oppressed is *particeps criminis*; since it is that very hardship which he labours under, and which is imposed upon him by another, that makes the crime (*g*).

§ 303. In regard to gaming contracts, it would follow, *à fortiori*, that courts of equity ought not to interfere in their favour, but ought to afford aid to suppress them; since not only can no action be brought on them by statute, but they may be justly pronounced to be immoral, as the practice tends to idleness, dissipation, and the ruin of families (*h*). If the money were actually paid in a case of gaming, courts of equity ought not to assist the loser to recover it back, upon the ground that he is *particeps criminis*. Lord Talbot on one occasion said: "The case of gamesters, to which this of [usury] has been compared, is no way parallel; for there both parties are criminal. And, if two persons will sit down, and endeavour to ruin one another, and

(*d*) *Scott v. Nesbit*, 2 Bro. C. C. 641; s.c. 2 Cox 183; *Benfield v. Solomons*, 9 Ves. 84.

(*e*) *Fitzroy v. Gwillim*, 1 T. R. 153.

(*f*) *Bosanquet v. Dashwood*, Cas. temp. Talb. 39; *Rawden v. Shadwell*, Ambler 269, and Mr. Blunt's notes.

(*g*) Lord Chancellor Talbot in *Bosanquet v. Dashwood*, Cas. temp. Talb. 41. The same principle applies to cases of annuities set aside for want of a memorial duly registered; and an account of the consideration paid, and payments made, will be taken, and the balance only will be required to be paid, upon a decree to give up the security. *Holbrook v. Sharpley*, 19 Ves. 131.

(*h*) *Robinson v. Bland*, 2 Burr. 1077.

one pays the money; if, after payment, he cannot recover it at law, I do not see that a court of equity has anything to do, but to stand neuter, there being in that case no oppression upon the party, as in this " (i). It does not seem that the Court of Chancery ever assumed a jurisdiction to set aside securities given in payment of gambling debts. These are now struck at by the Gaming Act of 9 Anne c. 19, and the Gaming Act of 1835.

§ 305. The civil law contains a most wholesome enforcement of moral justice upon this subject. It not only protects the loser against any liability to pay the money won in gaming; but if he has paid the money, he and his heirs have a right to recover it back at any distance of time; and no presumption or limitation of time runs against the claim. "Victum in aleæ lesu, non posse conveniri. Et, si solverit, habere repetitionem, tam ipsum, quam hæredes ejus, adversus victorem et ejus hæredes; idque perpetuo, et etiam post triginta annos" (k). Thirty years was the general limitation of rights in other cases.

§ 306. Questions are also often made, how far contracts, which are illegal by some positive law, or which are declared so upon principles of public policy, are capable, as between the parties, of a substantial confirmation. This subject has been already alluded to, and will be again touched in other places. The general rule is, that wherever any contract or conveyance is void, either by a positive law, or upon principles of public policy, it is deemed incapable of confirmation upon the maxim, *Quod ab initio non valet, in tractu temporis non convalescet* (l). But where it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately, and upon full examination, confirmed by the parties, such confirmation will avail to give it an *ex post facto* validity (m), and lapse of time is regarded as sufficient evidence of confirmation if unexplained (n), unless, as by the operation of the Infants' Relief Act, 1874, such promises are incapable of confirmation.

§ 307. Let us, in the next place, pass to the consideration of the second head of constructive frauds; namely, of those which arise from some peculiar confidential or fiduciary relation between the parties. In this class of cases, there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the difficulty of proof has induced courts of equity to grant relief independent of any such

(i) *Bosanquet v. Dashwood*, Cas. t. Talb. 41; *Quarrier v. Colston*, 1 Ph. 147.

(k) Cod. Lib. 3, tit. 43, l. 1.

(l) *Vernon's Case*, 4 Co. 2 b.; *Brook v. Hook*, L. R. 6 Ex. 89; *Goodwin v. Fielding*, 4 De G. M. & G. 90.

(m) *Crowe v. Ballard*, 1 Ves. Jr. 215; *Morse v. Royal*, 12 Ves. 355; *Savery v. King*, 5 H. L. C. 627.

(n) *Champion v. Rigby*, Tambl. 421; affd. 7 L. J. N. S. Ch. 211; *Allcard v. Skinner*, 36 Ch. D. 145.

ingredient, upon a motive of general public policy (o); and it is designed, in some degree, as a protection to the parties against the effects of overweening confidence, and self-delusion, and the infirmities of hasty and precipitate judgment. These courts will, therefore, often interfere in such cases, where, but for such a peculiar relation, they would either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner (p). The cases of influence arising by inference from the situation of the parties will be discussed in succeeding paragraphs. It is also to be observed that relief will be granted where undue influence has been proved to exist in fact (q).

§ 308. It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honourable man must experience, nor upon any notion of discretion, to prevent a voluntary gift or other act of a man, whereby he strips himself of his property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort (r). They do not sit, or affect to sit, in judgment upon cases, as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interest, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract merely because a man of more honour would not have entered into it. There must be some relation between the parties, which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But, when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence. The general principle, which governs in all cases of this sort, is, that if a confidence is reposed, and that confidence is abused, courts of equity will grant relief (s).

§ 309. In the first place, as to the relation of parent and child. A parent may exercise a natural and just influence over a child, and so long as he does not abuse his position, he may retain a benefit

(o) *Ex parte Lacey*, 6 Ves. 625; *Dent v. Bennett*, 4 M. & Cr. 269; *Benson v. Heathorn*, 1 Y. & C. Ch. 326.

(p) *Goddard v. Carlisle*, 9 Price 169; *Wright v. Carter*, 1903, 1 Ch. 27.

(q) *Smith v. Kay*, 7 H. L. C. 750.

(r) *Huguenin v. Baseley*, 14 Ves. 290.

(s) *Dent v. Bennett*, 4 M. & Cr. 269; *Boyse v. Rossborough*, 6 H. L. C. 2; *Wright v. Carter*, [1903] 1 Ch. 27; *In re Coomber*; *Coomber v. Coomber*, [1911] 1 Ch. 723.

conferred upon him by his child (*t*). Of this character are advantages obtained by a parent upon a resettlement of family estates. But the general rule is that when a child who is not emancipated from his parent's control, confers a benefit upon the parent, if the transaction is subsequently impeached by the child, the *onus* is on the parent to show that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the parent the benefit conferred by it. And, according to the universal rule in equity, volunteers claiming through the parent, and all persons with notice of the circumstances which raise the equity, stand in no better position than the parent (*u*). It is desirable, though not essential, when a child makes a gift to his father, that the child and the father should be represented by independent solicitors (*x*). And the same principles apply to a voluntary gift to a person who has put himself *in loco parentis* towards the donor (*y*).

§ 310. In the next place, as to the relation of client and legal adviser. It is obvious that this relation must give rise to great confidence between the parties, and to very strong influences over the actions, and rights, and interests of the client (*z*). The situation of a legal adviser puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which, between other persons, would be held unobjectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties (*a*). There are cases in which it has been asserted that, while the relation of client and solicitor subsists in its full vigour, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former (*b*); but the cases fall short of this, the principle being that the legal adviser must establish that a gift was the free

(*t*) *Bellamy v. Sabine*, 2 Ph. 425; *Hoghton v. Hoghton*, 15 Beav. 278; *Hartopp v. Hartopp*, 21 Beav. 259; *Hoblyn v. Hoblyn*, 41 Ch. D. 200.

(*u*) *Savery v. King*, 5 H. L. C. 627; *Baker v. Bradley*, 7 De G. M. & G. 597; *Turner v. Collins*, L. R. 7 Ch. 329; *Bainbrigge v. Brown*, 18 Ch. D. 188.

(*x*) *Gibbs v. Daniel*, 4 Giff. 1; *Bainbrigge v. Brown*, 18 Ch. D. 188; *Wright v. Carter*, [1903] 1 Ch. 27.

(*y*) *Archer v. Hudson*, 7 Beav. 551; *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 Sim. 68; *Kempson v. Ashbee*, L. R. 10 Ch. 15.

(*z*) *Holman v. Loynes*, 4 De G. M. & G. 270; *Savery v. King*, 5 H. L. C. 627; *Corley v. Lord Stafford*, 1 De G. & J. 238.

(*a*) *Wood v. Downes*, 18 Ves. 126; *Broun v. Kennedy*, 4 De G. J. & S. 217.

(*b*) *E.g.*, *Wood v. Downes*, 18 Ves. 126; *Goddard v. Carlisle*, 9 Price 169; *Edwards v. Meyrick*, 2 Hare 68; *Tomson v. Judge*, 3 Drew. 306.

uninfluenced act of the client (c), and that in the matter of a sale the legal adviser imparted to his client all the information the legal adviser in fact possessed, or which the client had a right to expect, if he had been advised by a skilled independent adviser (d). In the case of testamentary gifts, this purely equitable rule is inapplicable (e). It is still a doubtful point whether any difference exists in point of principle between gifts and purchases (f). The true explanation seems to rest in this, that courts of equity have always favoured purchasers, and refused to consider volunteers, as having a meritorious claim. It is also necessary to observe that the relationship of legal adviser and client must in fact exist in order that a transaction should be impeachable, and this necessitates in each case the determination of a question of fact (g).

§ 311. On the one hand, it is not necessary to establish that there has been fraud or imposition upon the client; and, on the other hand, it is not necessarily void throughout, *ipso facto*. But the burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the legal adviser upon the general rule, that he who bargains in a matter of advantage with a person placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other (h). If no such proof is established, courts of equity treat the case as one of constructive fraud. In this respect there is said to be a distinction between the case of a solicitor and client, and that of a trustee and *cestui que trust*. In the former, if the solicitor, retaining his connection, contracts with his client, he is subject to the *onus* of proving that no advantage has been taken of the situation of the latter. But in the case of a trustee, it is not sufficient to show that no advantage has been taken; but the *cestui que trust* may set aside the transaction at his own option (i). The reason of this distinction, which savours somewhat of nicety, if not of subtilty, seems to be, that in the case of clients the rule is general and applicable to all contracts, conveyances, and negotiations between

(c) *Harris v. Tremenheere*, 15 Ves. 40; *Hunter v. Atkins*, 3 M. & K. 113; *In re Coomber*; *Coomber v. Coomber*, [1911] 1 Ch. 723.

(d) *Bulkley v. Wilford*, 2 Cl. & F. 102; *Corley v. Lord Stafford*, 1 De G. & J. 238; *Luddy's Trustee v. Peard*, 33 Ch. D. 500; *Bell v. Marsh*, [1903] 1 Ch. 528.

(e) *Boyse v. Rossborough*, 6 H. L. C. 2; *Parfitt v. Lawless*, L. R. 2 P. & D. 462; *Baudains v. Richardson*, [1906] A. C. 169.

(f) See *Holman v. Loynes*, 4 De G. M. & G. 270; *Morgan v. Minett*, 6 Ch. D. 638; *In re Haslam and Hier-Evans*, [1902] 1 Ch. 765.

(g) *Goddard v. Carlisle*, 9 Price, 169; *Austin v. Chambers*, 6 Cl. & F. 1; *Carter v. Palmer*, 8 Cl. & F. 657; *Edwards v. Meyrick*, 2 Hare 60; *Holman v. Loynes*, 4 De G. M. & G. 270; *Guest v. Smythe*, L. R. 5 Ch. 551; *Allison v. Clayhills*, 97 L. T. 709.

(h) *Gibson v. Jeyes*, 6 Ves. 278; *Montesquieu v. Sandys*, 18 Ves. 313; *Dent v. Bennett*, 4 M. & Cr. 269; *Carter v. Palmer*, 8 Cl. & F. 657.

(i) *Cane v. Lord Allen*, 2 Dow 289, 299.

the solicitor and client, and is not limited to the property about which the solicitor is retained, or the suit in which he is acting. In the case of a trustee, the rule giving the *cestui que trust* an option, is limited to the purchase of the first property, and as to other property it would seem that the rule is the same as in other fiduciary relations, that is, at most, it only shifts the burden of proof from the seller to the buyer, to show the entire fairness of the transaction; or leaves the seller to establish presumptively, that there has been some irregularity in the bargain, or some influence connected with the relation under which it has been made.

§ 312. Thus, if a conveyance is obtained by a solicitor from a client, it will be set aside as obtained by undue influence, and the property will stand charged in the hands of the solicitor with the sums of money actually expended by him (*k*), or which he can show to be justly due (*l*), but subject to the charge the property is deemed the property of the client. So, also, where a solicitor's clerk, who was consulted by a lady in regard to a mortgage on her estate, by means of the knowledge thus acquired, was enabled to purchase the mortgage at much less than its amount, it was held that the lady was entitled to the benefit of the bargain (*m*). And where the solicitor becomes the purchaser of an estate of his client, the burden of sustaining it, at least within twenty years, is upon him; and it has been said by eminent judges, that the same weight ought not to be given to the lapse of time, during the continuance of the relation of attorney and client, as in other cases (*n*). Where the solicitor proposes to take any contract from his client for compensation, beyond what the law provides, or in a different form more advantageous to himself, it is his "bounden duty" to inform his client, that the law allows no such charge (*o*).

§ 313. Indeed, the general principle is so well established, that Lord Eldon, on one occasion, said: "It is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty" (*p*). But, where the relation is completely dissolved, and the parties are no longer under the antecedent influence, but deal with each other at arm's length, there is no ground to apply the principle, and they

(*k*) *Jones v. Thomas*, 2 Y. & C. Ex. 498; *Lewis v. Hillman*, 3 H. L. C. 607.

(*l*) *Lawless v. Mansfield*, 1 Dr. & War. 557; *Thomas v. Lloyd*, 3 Jnr. N.S. 288; *Gresley v. Mousley*, 3 De G. F. & J. 433.

(*m*) *Hobday v. Peters*, 28 Beav. 349.

(*n*) *Gresley v. Mousley*, 4 De G. & J. 78.

(*o*) *Bulkley v. Wilford*, 2 Cl. & F. 102; *Rhodes v. Bate*, L. R. 1 Ch. 257; *Cockburn v. Edwards*, 18 Ch. 449.

(*p*) *Hatch v. Hatch*, 9 Ves. 296, 297.

stand upon the rights and duties common to all other persons (*q*). And the same rule will or may apply, where the transaction is totally disconnected with the relation, and concerns objects and things not embraced in, or affected by, or dependent upon, that relation (*r*); and there is an absence of all other circumstances, which may create a just suspicion as to the integrity and fairness of the transaction.

§ 314. Similar considerations apply to the case of a medical adviser and his patient (*s*). For it would be a meagre sort of justice to say that the sort of policy which has induced the court to interfere between client and solicitor, should be restricted to such cases; since as much mischief might be produced, and as much fraud and dishonesty be practised, if transactions were permitted to stand, which arose between parties in equally confidential relations.

§ 315. In the next place, the relation of principal and agent. This is affected by the same considerations as the preceding, founded upon the same enlightened public policy (*t*). In all cases of this sort the principal contracts for the aid and benefit of the skill and judgment of the agent, and the habitual confidence reposed in the latter, make all his acts and statements possess a commanding influence over the former. Indeed, in such cases, the agent too often so entirely misleads the judgment of his principal that, while he is seeking his own peculiar advantage, he seems but consulting the advantage and interest of his principal; placing himself in the odious predicament so strongly stigmatized by Cicero: "Totius autem injustitiæ nulla capitalior est, quam eorum, qui, cum maxime fallunt, id agunt, ut viri boni esse videantur" (*u*). It is, therefore, for the common security of all mankind, that gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion. And, indeed, considering the abuses which may attend any dealings of this sort between principals and agents, a doubt has been expressed whether it would not have been wiser for the law in all cases to have prohibited them; since there must almost always be a conflict between duty and interest on such occasions. Be this as it may, it is very certain that agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals (*x*); or, by abusing their confidence, to acquire unreasonable

(*q*) *Gibson v. Jeyes*, 6 Ves. 277; *Guest v. Smythe*, L. R. 5 Ch. 551; *Bell v. Marsh*, [1898] 1 Ch. 212; *Allison v. Clayhills*, 97 L. T. 709.

(*r*) *Montesquieu v. Sandys*, 18 Ves. 313; *Jones v. Thomas*, 2 Y. & Coll. Ex. 498.

(*s*) *Dent v. Bennett*, 4 Myl. & Cr. 269; *Gibson v. Russell*, 2 Y. & Coll. Ch. 104; *Billage v. Southee*, 9 Hare 534.

(*t*) *Benson v. Heathorn*, 1 Y. & Coll. Ch. 326.

(*u*) Cic de Offic. Lib. 1, ch. 13.

(*x*) *Lewis v. Hillman*, 3 H. L. C. 607; *Kimber v. Barber*, L. R. 8 Ch. 56; *Roche-foucauld v. Boustead*, [1897] 1 Ch. 196; *Att.-Gen. (Canada) v. Standard Trust Co. of N. Y.*, [1911] A. C. 498.

gifts or advantages (*y*); unless known and sanctioned by the principal (*z*); or, indeed, to deal validly with their principals in any case, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition (*zz*).

§ 316. Upon these principles, if an agent sells to his principal his own property, as the property of another, without disclosing the fact, the bargain, at the election of the principal, will be held void (*a*). So, if an agent, employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer (*b*). Therefore, if a person is employed as an agent, to purchase up a debt of his employer, he cannot purchase the debt upon his own account, for he is bound to purchase it at as low a rate as he can; and he would otherwise be tempted to violate his duty (*c*). The same rule applies to a surety, who purchases up the debt of his principal (*d*). And, therefore, in each case, if a purchase is made of the debt, the agent or surety can entitle himself, as against his principal, to no more than he has actually paid for the debt. So, if an agent discover a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; if he do, he will be held a trustee for his principal (*e*).

§ 317. In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, but with an important modification. A guardian is not bound to a strict account of moneys received by him for the maintenance of an infant; it is sufficient if he has substantially complied with his duty to maintain the infant (*f*). It is obvious that, during the existence of the guardianship, where the ward is necessarily a minor, the transactions between the guardian and the ward cannot be binding upon the latter. But courts of equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith (*uberrima fides*)

(*y*) *Fawcett v. Whitehouse*, 1 Russ. and M. 132; *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339; *Powell v. Evans, Jones & Co.*, [1905] 1 K. B. 11. See also *Illegal Commissions Act*.

(*z*) *Great Western Insurance Co. v. Cunliffe*, L. R. 9 Ch. 525; *Baring v. Stanton*, 3 Ch. D. 502; *Williamson v. Hine*, [1891] 1 Ch. 390; *Stubbs v. Slater*, [1910] 1 Ch. 632.

(*zz*) *Coles v. Trecothick*, 9 Ves. 246; *Montesquieu v. Sandys*, 18 Ves. 302; *Hay's Case*, L. R. 10 Ch. 593.

(*a*) *Tyrrell v. Bank of London*, 10 H. L. C. 26.

(*b*) *Lees v. Nuttall*, 1 Russ. & Myl. 53; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. See *In re Finlay, Wilson & Co. v. Finlay*, [1913] 1 Ch. 565.

(*c*) *Carter v. Palmer*, 8 Cl. & F. 657; *Lawless v. Mansfield*, 1 Dr. & War. 557.

(*d*) *Reed v. Norris*, 2 Myl. & Cr. 361. (*e*) *Bulkley v. Wilford*, 2 Cl. & F. 102.

(*f*) *Leach v. Leach*, 13 Sim. 304; *In re Evans; Welch v. Channell*, 26 Ch. D. 58; *Cf. Strangways v. Read*, [1898] 2 Ch. 419.

on the part of the guardian. For, in all such cases, the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as, if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian (*g*).

§ 320. In the case to which these principles have been applied, in order to set aside grants and other transactions between guardian and ward, two circumstances of great importance have generally concurred: first, that the grants and transactions have taken place immediately upon the ward's attaining age; and, secondly, that the former influence of the guardian has been demonstrated to exist to an undue degree; or, in other words, that the parties have not met upon equal terms. If, therefore, the relation has entirely ceased, not merely in name but in fact, and if sufficient time has elapsed to put the parties in complete independence as to each other; and if a full and fair settlement of all transactions growing out of the relation has been made, there is no objection to any bounty or grant conferred by the ward upon his guardian (*h*). Indeed, in such cases, it is only the performance of a highly moral duty, recommended as well by law as by natural justice.

§ 321. In the next place, with regard to the relation of trustee and *cestui que trust*, or rather beneficiary, or fide-commissary, as we could wish the person beneficially interested might be called, to escape from the awkwardness of a barbarous modification of a foreign idiom (*i*). In this class of cases the same principles govern as in cases of guardian and ward, with at least as much enlarged liberality of application, and upon grounds quite as comprehensive. Indeed, the cases are usually treated as if they were identical (*k*). A trustee is never permitted to partake of the bounty of the party for whom he acts,

(*g*) *Hatch v. Hatch*, 9 Ves. 292; *Revett v. Harvey*, 1 Sim. & St. 502; *Wedderburn v. Wedderburn*, 4 M. & Cr. 41; *Kempson v. Ashbee*, L. R. 10 Ch. 15.

(*h*) *Hylton v. Hylton*, 2 Ves. Sen. 547, 549.

(*i*) The phrase *cestui que trust* is a barbarous Norman law French phrase; and is so ungainly and ill adapted to the English idiom, that it is surprising that the good sense of the English legal profession has not long since banished it, and substituted some phrase in the English idiom, furnishing an analogous meaning. In the Roman law the trustee was commonly called *hæres fiduciarius*; and the *cestui que trust*, *hæres fidei commissarius*, which Dr. Halifax has not scrupled to translate *fide-committee* (Halifax, Anal. of Civil Law, ch. 6, § 16, p. 34; id. ch. 8, § 2, 3, pp. 45, 46). I prefer fide-commissary, as at least equally within the analogy of the English language. But beneficiary, though a little remote from the original meaning of the word, would be a very appropriate word, as it has not, as yet, acquired any general use in a different sense. *Hæres fidei commissarius* was sometimes used in the civil law to denote the trustee. See Vicat, Vocab. voce *Fidei commissarius*. The French law calls the *cestui que trust*, *fidei commissaire*. See Ferrière, Dict. voce *fidei commissaire*. Merlin, Répertoire voce *Substitution*, et *substitution fidei commissaire*. Dr. Brown uses the word *fidei-commissary* (1 Brown, Civil Law, 190, note).

(*k*) *Hatch v. Hatch*, 9 Ves. 292, 296, 297; *Bulkely v. Wilford*, 2 Cl. & F. 102, 177 to 183; ante, § 317, 320.

except under circumstances which would make the same valid, if it were a case of guardianship; that is, a trustee may purchase of his *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances; and it is clear that the *cestui que trust* intended that the trustee should buy; and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee. But it is difficult to make out such a case, where the exception is taken, especially where there is any inadequacy of price or any inequality in the bargain (l). And therefore, if a trustee, though strictly honest, should buy for himself an estate of his *cestui que trust*, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not to be permitted to sell to or for himself (m).

§ 322. But we are not to understand, from this last language, that, to entitle the *cestui que trust* to relief, it is indispensable to show that the trustee has made some advantage, where there has been a purchase by himself; and that, unless some advantage has been made, the sale of the trustee is good. That would not be putting the doctrine upon its true ground, which is, that the prohibition arises from the subsisting relation of trusteeship. The ingredient of advantage made by him would only go to establish, that the transaction might be open to the strong imputation of being tainted by imposition or selfish cunning. But the principle applies, however innocent the purchase may be in a given case. It is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so; and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and, without showing essential injury, to insist upon having the experiment of another sale, or to compel the trustee to reconvey the estate to himself on repayment of the purchase-money with 4 per cent. interest. So that in fact, in all cases where a purchase has been made by a trustee on his own account of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bonâ fide* made or not (n). So a trustee will not be permitted to obtain any profit or advantage to

(l) *Coles v. Trecothick*, 9 Ves. 246; *Benningfield v. Baxter*, 12 App. Cas. 167; *Williams v. Scott*, [1900] A. C. 499.

(m) See *Fox v. Mackreth*, 2 Bro. C. C. 400; 2 Cox, 158, 320; 4 Bro. P. C. 258.

(n) *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 601; *Ex parte Lacey*, 6 Ves. 625; *Morse v. Royal*, 12 Ves. 355.

himself in managing the concerns of the trust, but whatever benefits or profits are obtained will belong exclusively to the *cestui que trust*; but the trustee is entitled to retain a collateral profit, although it is acquired by him in consequence of his appointment (o). In short, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it (p). And this doctrine applies, not only to trustees strictly so called, but to other persons standing in like situation; such as trustees and solicitors of a bankrupt estate, who are never permitted to become purchasers at the sale of the bankrupt estate (q). Further, a person in a fiduciary position is not permitted to purchase up the debts of his beneficiaries on his own account; but, whatever advantage is thus derived by him by purchases at an undue value, is for the common benefit of the estate (r). Indeed, the doctrine may be more broadly stated; that executors or administrators will not be permitted, under any circumstances, to derive direct personal benefit from the manner in which they transact the business, or manage the assets, of the estate. And if a trustee misapply the funds of his *cestui que trust* or beneficiary, and purchase a judgment or other security therewith, the latter has an election to take such judgment or security, or to call upon the trustee to make good the original fund.

§ 323. There are many other cases of persons, standing, in regard to each other, in the like confidential relations, in which similar principles apply. Among these may be enumerated the cases which arise from the relation of penitent and spiritual adviser (s), and perhaps of master and servant (t). But it would occupy too much space to go over them at large; and most of them are resolvable into the principles already commented on. On the whole, the doctrine may be generally stated that wherever confidence is reposed, and one party has it in his power, in a secret manner for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage (u).

§ 323 (a.) Since the author wrote, a pertinent illustration has been afforded by the case of joint stock companies. Generally speaking, a

(o) *Kirkman v. Booth*, 11 Beav. 273; *In re Barber, Burgess v. Vinnicorne*, 34 Ch. D. 77; *In re Dover Coalfields Extension, Lim.*, [1908] 1 Ch. 65; *In re Lewis, Lewis v. Lewis*, 103 L. T. 495; *Bath v. Standard Land Co.*, [1911] 2 Ch. 618.

(p) *Hamilton v. Wright*, 9 Cl. & F. 111.

(q) *Ex parte Lacey*, 6 Ves. 625; *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. 381.

(r) *Pooley v. Quilter*, 2 De G. & J. 327.

(s) *Huguenin v. Baseley*, 14 Ves. 273; *Allcard v. Skinner*, 36 Ch. D. 145; *Morley v. Loughman*, [1893] 1 Ch. 736.

(t) *Nantes v. Corrock*, 9 Ves. 182; *Consett v. Bell*, 1 Y. & C. Ch. 569; *Bate v. Bank of England*, 9 Jur. 545; *Gibson v. Russell*, 2 Y. & C. Ch. 104.

(u) *Dent v. Bennett*, 4 M. & Cr. 269.

director stands in a fiduciary position to the company (*x*), and cannot retain a profit made by him, but the constitution of the company may permit him to do so (*y*), and even to override the wishes of the majority of the shareholders (*z*), and in any event he can exercise his individual rights as a corporator (*a*). Promoters are also bound to the fullest disclosure (*b*). The term promoter has been defined as “ a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence ” (*c*).

§ 324. The case of principal and surety may also, as a striking illustration of this doctrine, be briefly referred to. The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract. Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety. If any stipulations, therefore, are made between the creditor and the debtor which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract (*d*). And, on the other hand, if any stipulations for additional security or other advantages are obtained between the creditor and the debtor, the surety is entitled to the fullest benefit of them (*e*).

§ 325. Indeed, the proposition may be stated in a more general form; that if a creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him in equity.

§ 326. It is upon this ground, that if a creditor, without any communication with the surety, and assent on his part, should afterwards enter into any new contract with the principal, inconsistent with the

(*x*) *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189; *Cavendish Bentinck v. Fenn*, 12 App. Cas. 652.

(*y*) *Costa Rica Ry. v. Forwood*, [1901] 1 Ch. 746.

(*z*) *Quin & Axtens, Ltd. v. Salmon*, [1909] A. C. 442.

(*a*) *North West Transportation Co. v. Beatty*, 12 App. Cas. 589.

(*b*) *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392.

(*c*) *Bowen, J., Waley Bridge Co. v. Green*, 5 Q. B. D. 109; see also *Lindley, L.J., Lydney & Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85.

(*d*) *Pidcock v. Bishop*, 3 B. & C. 605; *Bonar v. Macdonald*, 3 H. L. C. 226.

(*e*) *Pearl v. Deacon*, 1 De G. & J. 461.

former contract, or should stipulate, in a binding manner, upon a sufficient consideration, for further delay and postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety (f). But it is not every alteration of his position by the act of the creditor, which will discharge the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor (g). And where the creditor, in making the arrangement with the principal to give time, or otherwise vary the strict enforcement of the letter of the contract, reserves his rights against the surety, although without communicating this fact to the surety, it will not operate as a release of the surety (h). But there is no positive duty incumbent on the creditor to prosecute measures of active diligence; and, therefore, mere delay on his part (at least if some other equity does not interfere), unaccompanied by any valid contract for such delay, will not amount to laches, so as to discharge the surety (i). On the other hand, if the creditor has any security from the debtor, and he parts with it, without communication with the surety, or by his gross negligence it is lost, that will operate, at least to the value of the security, to discharge the surety (k). And even where done under a misapprehension, the consequences must fall upon the person who did the act (l). It is immaterial in what character the parties contracted originally. The moment the creditor has notice that the relation of the parties *inter se* is that of principal and surety, he must, in his subsequent dealings, respect the true contract between the other parties (m).

§ 327. Sureties also, are entitled to come into a court of equity, after a debt has become due, to compel the debtor to exonerate them from their liability, by paying the debt; or sue in the creditor's name, and collect the debt from the principal, if he will indemnify the creditor against the risk, delay, and expense of the suit (n). And they have a clear right, upon paying the debt to the principal, to be substituted in the place of the creditor, as to all securities held by the latter for the debt, and to have the same benefit that he would have therein (o). This, however, is not the place to consider at large the general rights

(f) *Rees v. Berrington*, 2 Ves. Jun. 540; *Bonar v. Macdonald*, 3 H. L. C. 226; *Perry v. National Provincial Bank of England*, [1910] 1 Ch 464.

(g) *Tucker v. Laing*, 2 K. & J. 745.

(h) *Webb v. Hewitt*, 3 K. & J. 338; *Green v. Wymer*, L. R. 4 Ch. 204.

(i) *Wright v. Simpson*, 6 Ves. 734; *Heath v. Hay*, 1 Y. & Jer. 434; *Carter v. White*, 25 Ch. D. 666.

(k) *Mayhew v. Crickett*, 2 Swanst. 185, 191, and note (a); *Stirling v. Forrester*, 2 Bli. 575.

(l) Lord Eldon, in *Ex parte Wilson*, 11 Ves. 410.

(m) *Rouse v. Bradford Banking Co.*, [1894] A. C. 586.

(n) *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Ascherman v. Tredegar Dry Dock Co.*, [1909] 2 Ch. 401.

(o) *Bowker v. Bule*, 1 Sim. N. S. 29; *Berridge v. Berridge*, 44 Ch. D. 168; *Gee v. Liddell*, [1913] 2 Ch. 62.

and duties of persons standing in the relation of creditors, debtors, and sureties; and we shall have occasion again to advert to the subject, when considering the marshalling of securities in favour of sureties (p).

§ 328. Let us now pass to the consideration of the third class of constructive frauds, combining, in some degree, the ingredients of the others, but prohibited mainly, because they unconscientiously compromise, or injuriously affect, the private rights, interests, or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties, or intentions of third persons.

§ 329. With regard to this last class, much that has been already stated, under the preceding head of positive or actual fraud, as to unconscionable advantages, overreaching, imposition, undue influence, and fiduciary situations, may well be applied here, although certainly with diminished force, as the remarks there made did not turn exclusively upon constructive fraud.

§ 330. To this same class may also be referred many of the cases arising under the Statute of Frauds, which requires certain contracts to be in writing, in order to give them validity, or to be proved by written evidence. In the construction of that statute, a general principle has been adopted, that, as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. The Court of Chancery, in its later days, disclaimed, and the High Court disclaims, any jurisdiction to grant relief upon the ground that there is no writing; but the court has granted relief where a party has by fraud prevented written evidence being produced, as if an heir should prevent an ancestor executing a will, as the statute required, under sections which are now replaced by the Wills Act, 1837 (q); or if a party to a contract should obtain the suppression of a written document by fraud or imposition (r); and there may be other instances, but short of fraud there is nothing inequitable in relying upon an unrepealed statute (s).

§ 331. And, here, we may apply the remark, that the proper jurisdiction of courts of equity is to take every one's act, according to conscience, and not to suffer undue advantage to be taken of the strict forms of law, or of positive rules. Hence it is, that, even if there be no proof of fraud or imposition; yet, if upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of equity will sometimes interfere and grant relief (t); although they certainly are very cautious of interfering, unless upon very strong circumstances. But the mere fact that the bargain is a very hard or unreasonable one, is not,

(p) *Post*, § 499. 502, 637.

(q) *Viscountess Montacute v. Maxwell*, 1 P. Wms. 616.

(r) *Mallet v. Halpenny*, cited Prec. Ch. at p. 404.

(s) *Wood v. Midgley*, 5 De G. M. & G. 41.

(t) *Bowes v. Heaps*, 3 Ves. & B. 117.

generally, sufficient, *per se*, to induce these courts to interfere (*u*). And, indeed, it will be found that there are very few cases not infected with positive or actual fraud, in which they do interfere, except where the parties stand in some very peculiar predicament, and in some sort, under the protection of the law, from age, or character, or relationship (*x*).

§ 333. But the great class of cases, in which relief is granted, under this head, is where the contract or other act is substantially a fraud upon the rights, interests, duties, or intentions of third persons. And, here, the general rule is, that particular persons, in contracts, and other acts, shall not only transact *bonâ fide* between themselves but shall not transact *malâ fide* in respect to other persons, who stand in such a relation to either, as to be affected by the contract or the consequences of it (*y*). And, as the rest of mankind, besides the parties contracting, are concerned, the rule is properly said to be governed by public utility (*z*).

§ 334. It is upon this ground, that relief has been constantly granted, in what are called catching bargains with heirs, reversioners, and expectants, during the life of their parents or other ancestors (*zz*). Many, and, indeed, most of these cases (as has been pointedly remarked by Lord Hardwicke), “ have been mixed cases, compounded of almost every species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting, from weakness on one side and usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons, not privy to the fraudulent agreement. The father, ancestor, or relation from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand ” (*a*).

§ 335. Strong as this language may appear, it is fully borne out by the general complexion of the cases in which relief has been afforded.

(*u*) *White v. Damon*, 7 Ves. 30; *Harrison v. Guest*, 4 De G. M. & G. 424.

(*x*) See *Huguenin v. Baseley*, 14 Ves. 271; *Davis v. Duke of Marlborough*, 2 Swanst. 149, and note (*a*); *O'Rorke v. Bolingbroke*, 2 App. Cas. 822.

(*y*) Per Lord Hardwicke, in *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 156, 157.

(*z*) *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 156, 157.

(*zz*) *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125; *Nevill v. Snelling*, 15 Ch. D. 679.

(*a*) Lord Hardwicke, in *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 157.

Actual fraud, indeed, has not unfrequently been repelled (*b*). Relief is granted, not only in the case of sales (*c*), and mortgages (*d*), where the security is tangible, but to post obit bonds (*e*), and also to those cases where the lender hoped to be able “to put the screw on” by enforcing his security (*f*). Next, the parties seeking relief need not be young, rash, or dissolute; parties aged thirty-eight and also thirty years respectively have successfully invoked the rule (*g*). “It is not every bargain which distress may induce one man to offer, that another is at liberty to accept” (*h*). The jurisdiction to relieve against improvidence is saved by section 1, sub-section 6 of the Moneylenders Act, 1900, which, as amended by the Moneylenders Act, 1911, enables the court to grant extended relief in transactions with moneylenders (*i*).

§ 335a. The doctrines held by courts of equity as to the requirements necessary to make a sale of reversionary interests valid, were so severe that it became needful for the legislature to interfere, and accordingly, the Sales of Reversions Act, 1868 (31 & 32 Vict. c. 4) was passed, which enacted that “no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate should thereafter be opened or set aside merely on the ground of undervalue” (section 1); and it was provided further that under the word “purchase” should be included every kind of contract, conveyance, or assignment, under or by which any beneficial interest in any kind of property should be acquired. Now it will be observed that although undervalue is not *per se* sufficient, it may yet be used as evidence of unfair dealing upon which the court of chancery based its title to relief (*k*). In addition to this there must be no fraud or unfair dealing. In relation to this enactment it has been said that “these changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of Lord Hardwicke, raise, ‘from the circumstances or conditions of the parties contracting (weakness on one side, usury on the other, or extortion, or advantage taken of that weakness), a presumption of fraud.’ Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the

(*b*) *Peacock v. Evans*, 16 Ves. 512; *Bowes v. Heaps*, 3 Ves. & B. 117.

(*c*) *Baker v. Monk*, 4 De G. J. & S. 388; *Fry v. Lane*, 40 Ch. D. 312; *Rees v. De Bernardy*, [1896] 2 Ch. 437.

(*d*) *Bromley v. Smith*, 26 Beav. 644; *James v. Kerr*, 40 Ch. D. 449.

(*e*) *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125.

(*f*) *Nevill v. Snelling*, 15 Ch. D. 679.

(*g*) *Bromley v. Smith*, 26 Beav. 644; *Brenchley v. Higgins*, 70 L. J. Ch. 788.

(*h*) *Grant M.R., Bowes v. Heaps*, 3 Ves. & B. 117.

(*i*) *Samuel v. Newbold*, [1906] A. C. 461.

(*k*) *O'Rorke v. Bolingbroke*, 2 App. Cas. 814; *Fry v. Lane*, 40 Ch. D. 312.

presumption by contrary evidence proving it to have been, in point of fact, 'fair, just, and reasonable.' '' (l). Formerly, a sale by auction was *primâ facie* evidence of the true value, while a sale by private contract was deemed to afford no criterion of value (m).

§ 335b. It should be further observed, that if the expectant heir or other person similarly defrauded be an infant, no question as to the validity of contracts for the repayment of money lent to them can arise, for by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), it is enacted that all contracts, whether by speciality or by simple contract, thenceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), shall be absolutely void.

§ 339. The whole doctrine of courts of equity, with respect to expectant heirs and reversioners, and others in a like predicament, assumes that the one party is defenceless, and is exposed to the demands of the other under the pressure of necessity. It assumes, also, that there is a direct or implied fraud upon the parent or other ancestor, who, from ignorance of the transaction, is misled into a false confidence in the disposition of his property. Hence it should seem, that one material qualification of the doctrine is, the existence of such ignorance. If, therefore, the transaction has been fully made known at the time to the parent, or other person standing *in loco parentis* (n), as, for example, to the person from whom the *spes successionis* is entertained, or after the expiration of whose present estate the reversionary interest is to become vested in possession, and it is not objected to by him, the extraordinary protection, generally afforded in cases of this sort by courts of equity, will be withdrawn. *A fortiori*, it will be withdrawn, if the transaction is expressly sanctioned or adopted by such parent or other person standing *in loco parentis* (o). And it has been strongly said, that it would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by, and suffer his son to obtain the assistance which he ought himself to have rendered, and then only stand forward to aid him in rescinding engagements, which he had allowed him to make, and to profit by (p).

§ 340. The other qualification of the doctrine is not less important. The contract must be made under the pressure of some necessity; for the main ground of the doctrine is, the pressure upon the heir,

(l) *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484; *Brenchley v. Higgins*, 70 L. J. Ch. 788.

(m) *Shelly v. Nash*, 3 Madd. 232; *Earl of Aldborough v. Trye*, 7 Cl. & F. 436; *In re Slater's Trusts*, 11 Ch. D. 227.

(n) *Tyler v. Yates*, L. R. 6 Ch. 665.

(o) *King v. Hamlet*, 4 Sim. 223; s.c. 2 Myl. & K. 456; *O'Rorke v. Bolingbroke*, 2 App. Cas. 814.

(p) *King v. Hamlet*, 2 Myl. & K. 456; s.c. 4 Sim. 182.

or the distress of the party, dealing with his expectancies, who is, therefore, under strong temptations to make undue sacrifices of his future interests (*q*). Both of these qualifications need not, indeed, in all cases and under all circumstances, concur to justify relief. It may be sufficient, that either of them forms so essential an ingredient in the case as to give rise to a just presumption of constructive fraud (*r*).

§ 341. The doctrine of courts of equity upon this subject, if it has not been directly borrowed from, does in no small degree follow out the policy of, the Roman law in regard to heirs and expectants. By the Macedonian decree (so called from the name of the usurer who gave occasion to it), all obligations of sons, contracted by the loan of money, while they were living in subjection to the paternal authority and jurisdiction, were declared null without distinction. And they were not allowed to be valid even after the death of the father; not so much out of favour to the son as out of odium to the creditor, who had made an unlawful loan, which was vicious in its origin as well as in its example. “*Verba Senatus consulti Macedoniani hæc sunt, etc. Placere, ne cui, qui filiofamilias mutuam pecuniam dedisset, etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitioque daretur; ut scirent, qui pessimo exemplo fænerarent, nullius posse filiifamilias bonum nomen, expectata patris morte, fieri*” (*s*). Upon this decree Lord Hardwicke has remarked that the senate and law-makers in Rome were not so weak as not to know that a law to restrain prodigality, to prevent a son’s running in debt in the life of his father, would be vain in many cases. Yet they made laws to this purpose, namely, the Macedonian decree already mentioned, happy if they could in some degree prevent it; *Est aliquod prodire tenus* (*t*)

§ 342. It is upon similar principles that *post obit* bonds, and other securities of a like nature, are set aside when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, upon the death of a person from whom he (the obligor) has some expectations, if he should survive him. Such bonds operate as a virtual fraud upon the bounty of the ancestor, and disappoint his intentions, generally by design, and usually in the event (*u*).

§ 343. A case of a very similar character is a contract by which an expectant heir, upon the present receipt of a sum of money, promises to pay over to the lender a large, though an uncertain proportion, of the property which might descend to him upon the death of his parent or other ancestor, if he should survive him. It is

(*q*) *King v. Hamlet*, 4 Sim. 182; s.c. 2 Myl. & K. 456.

(*r*) *Earl of Portmore v. Taylor*, 4 Sim. 182.

(*s*) Dig. Lib. 14, tit. 6, f. 1.

(*t*) *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 158.

(*u*) *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125.

a fraud upon such parent or other ancestor, and introductive of the worst public mischiefs; for the parent or ancestor is thereby induced to submit in ignorance to the disposition which the law makes of his estate, upon the supposition that it will go to his heir, when in fact a stranger is, against his will, made the substituted heir. It might be very different if there was a fair, although a secret, agreement between all the heirs to share the estate equally; for such an agreement would have a tendency to suppress all attempts of one or more to overreach the others, as well as to prevent all exertions of undue influence (x).

§ 344. From what has been already said, it follows, as a natural inference, that contracts of this sort are not in all cases utterly void; but they are subject to all real and just equities between the parties, so that there shall be no inadequacy of price and no inequality of advantages in the bargain. If in other respects these contracts are perfectly fair, courts of equity will permit them to have effect, as securities for the sum to which *ex æquo et bono* the lender is entitled; for he who seeks equity must do equity; and, therefore, relief will not be granted upon such securities, except upon equitable terms (y).

§ 345. And where, after the contemplated events have occurred, and the pressure of necessity has been removed, the party freely and deliberately, and upon full information, confirms the precedent contract, or other transaction, or delays unduly to seek the assistance of the court, courts of equity will generally hold him bound thereby; for if a man is fully informed, and acts with his eyes open, he may, by a new agreement, bar himself from relief (z). But if the party is still acting under the pressure of the original transaction or the original necessity, or if he is still under the influence of the original transaction, and of the delusive opinion that it is valid and binding upon him, then, and under such circumstances, courts of equity will hold him not barred from relief by any such confirmation (a).

§ 346. Similar principles will govern in cases where the heir or other expectant is relieved from his necessities, and becomes opposed to the person with whom he has been dealing, and seeks to repudiate the bargain. In such cases he must not do any act by which the rights or property of the other party will be injuriously affected after he is thus deemed to be restored to his general capacity. If he does, he becomes affected with the ordinary rule which governs in other cases,

(x) *Wethered v. Wethered*, 2 Sim. 183; *Hyde v. White*, 5 Sim. 524; *Higgins v. Hill*, 56 L. T. 426. See *Cook v. Field*, 15 Q. B. 460.

(y) *Earl of Aldborough v. Trye*, 7 Cl. & F. 436; *Benyon v. Fitch*, 35 Beav. 570; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484.

(z) *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125; *Sibbering v. Earl of Balcarres*, 3 De G. & Sm. 735; *Lord v. Jeffkins*, 35 Beav. 1; *Dimsdale v. Dimsdale*, 3 Drew. 556.

(a) *Savery v. King*, 5 H. L. C. 627; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484; *Moxon v. Payne*, L. R. 8 Ch. 881.

and forbids a party to repudiate a dealing, and at the same time to avail himself fully of all the rights and powers resulting therefrom, as if it were completely valid (b).

§ 347. Even the sale of a *post obit* bond at public auction will not necessarily give it validity, or free it from the imputation of being obtained under the pressure of necessity. For the circumstances may be such as to establish that the expectant is acting without any of the usual precautions to obtain a fair price, and is in great distress for money, and is really in the hands, and under the control of those who choose to become bidders for the purpose of fleecing him (c). The case is not like the case of an ordinary sale of a reversion at public auction, where the usual precautions are taken; for there it may be perfectly proper not to require the purchaser to show that he has given the full value (d). Where the sale is public, and free and fair, it may be justly presumed that the fair market-price is obtained, and there seems no reason to call in question its general validity; but it should be specially impeached. In sales of reversions at public auction, there is not usually any opportunity, as there is upon a private treaty, for fraud and imposition upon the seller. The latter is in no just sense in the power of the purchaser. The sale by public auction is, under ordinary circumstances, evidence of the market-price (e). But the sale of *post obit* bonds at auction carries with it, generally, a presumption of distress and pecuniary embarrassment; and if the ordinary precautions are thrown aside, there is a violent presumption of extravagant rashness, imprudence, or circumvention.

§ 348. Contracts of a nature nearly resembling *post obit* bonds have, in cases of young and expectant heirs, been often relieved against, upon similar principles. Thus, where tradesmen and others have sold goods to such persons at extravagant prices, and under circumstances demonstrating imposition, or undue advantage, or an intention to connive at secret extravagance, and profuse expenditures, unknown to their parents, or other ancestors, courts of equity have reduced the securities, and cut down the claims to their reasonable and just amount (f).

§ 349. Another class of constructive frauds upon the rights, interest, or duties of third persons, embraces all those agreements and other acts of parties, which operate directly or virtually to delay, defraud, or deceive creditors. Of course, we do not here speak of

(b) *King v. Hamlet*, 2 Myl. & K. 458; *Savery v. King*, 5 H. L. C. 627; *Scholefield v. Templer*, 4 De G. & J. 429.

(c) *Fox v. Wright*, 6 Mad. 111; *Earl of Aldborough v. Trye*, 7 Cl. & F. 436.

(d) *Earl of Aldborough v. Trye*, 7 Cl. & F. 436.

(e) *Shelly v. Nash*, 3 Mad. 232; *Fox v. Wright*, 6 Mad. 77; *Earl of Aldborough v. Trye*, 7 Cl. & F. 436; *Lord v. Jeffkins*, 35 Beav. 7.

(f) *Bill v. Price*, 1 Vern. 467, and Mr. Raithby's note (1); *Freeman v. Bishop*, 2 Atk. 39.

cases of express and intentional fraud upon creditors, but of such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interest. It is difficult, in many cases of this sort, to separate the ingredients, which belong to positive and intentional fraud, from those of a mere constructive nature, which the law pronounces fraudulent upon principles of public policy. Indeed, they are often found mixed up in the same transaction; and any attempt to distinguish between them, or to weigh them separately, would be a task of little utility, and might, perhaps, mislead and perplex the inquiries of students.

§ 350. It must be a fundamental policy of all enlightened nations, to protect and subserve the rights of creditors; and a great anxiety to afford full relief against frauds upon them has been manifested: not only in the civil law, but from a very early period in the common law also. In the civil law it was declared, that whatever was done by debtors to defeat their creditors, whether by alienation, or by other disposition of their property, should be revoked or null, as the case might require. “*Ait Prætor; Quæ fraudationis causâ gesta erunt, cum eo, qui fraudem non ignoraverit; de his curatori bonorum, vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo. Necessario Prætor hoc edictum proposuit; quo edicto consuluit creditoribus, revocando ea, quæcunque in fraudem eorum alienata sunt (g). Ait ergo Prætor; Quæ fraudationis causa gesta erunt. Hæc verba generalia sunt, et continent in se omnem omnino in fraudem factam, vel alienationem vel quemcunque contractum. Quodcunque igitur fraudis causâ factum est, videtur his verbis revocari, quæcunque fuerit. Nam, latè ista verba patent. Sive ergo rem alienavit, sive acceptitatione vel pacto aliquem liberavit (h). Idem erit probandum. Et si pignora liberet, vel quem alium in fraudem creditorum præponat (i).* And the rule was not only applied to alienations, but to fraudulent debts, and, indeed, to every species of transaction or omission, prejudicial to creditors. “*Vel ei præbuit exceptionem, sive se obligavit fraudandorum creditorum causâ, sive numeravit pecuniam, vel quodcunque aliud fecit in fraudem creditorum; palam est, edictum locum habere, etc. Et qui aliquid fecit, ut desinat habere, quod habet, ad hoc edictum pertinet. In fraudem facere videri etiam eum, qui non facit, quod debet facere, intelligendum est; id est, si non utitur servitutibus (k).*

§ 351. Hence, all voluntary dispositions, made by debtors, upon the score of liberality, were revocable, whether the donee knew of

(g) Dig. Lib. 42, tit. 8, f. 1, § 1.

(h) Dig. Lib. 42, tit. 8, f. 1, § 2.

(i) Dig. Lib. 42, tit. 8, f. 2.

(k) Dig. Lib. 42, tit. 8, f. 3, § 1, 2; id. f. 4.

the prejudice intended to the creditors or not. “ Simili modo dicimus, et si cui donatum est, non esse quærendum, an sciente eo, cui donatum gestum sit; sed hoc tantum, an fraudulentur creditores ” (l). And the like rule was applied to purchasers, even for a valuable consideration, if they knew the fraudulent intention at the time of their purchases, and thus became partakers of it, that they might profit by it (m). “ Quæ fraudationis causâ gesta erunt, cum eo, qui fraudem non ignoraverit, de his, etc., actionem dabo. Si debitor in fraudem creditorum minore pretio fundum scienti emptori vendiderit; deinde hi, quibus de revocando eo actio datur, eum petant; quæsitum est, an pretium restituere debent? Proculus existimat, omnimodi restituendum esse fundum, etiamsi pretium non solvatur; et rescriptum est secundum Proculi sententiam ” (n).

§ 352. The common law adopted similar principles at an early period. These principles, however, have been more fully carried into effect by the statutes of 50 Edw. 3, c. 6, and 3 Hen. 7, c. 4, against fraudulent gifts of goods and chattels; by the statute of 13 Eliz. c. 5, against fraudulent conveyances of lands to defeat or delay creditors; and by the statute of 27 Eliz. c. 4, against fraudulent or voluntary conveyances of lands to defeat subsequent purchasers. These statutes have always received a favourable and liberal interpretation in all the courts, both of law and equity, in suppression of fraud (o). Indeed, the principles and rules of the common law, as now universally known and understood, are so strong against fraud, in every shape, that Lord Mansfield has remarked, that the common law would have attained every end proposed by these statutes (p). This is, perhaps, stating the matter somewhat too broadly, at least in regard to the statute of 27 Eliz. c. 4. This statute applies to land and not to personalty (q). A series of decisions had established that a settler could defeat a voluntary settlement of land by a subsequent sale for value to a third party, even if he had notice of the settlement (r). By the Voluntary Conveyances Act, 1893, however, the settlement must now be, in fact, fraudulent to be invalid. Courts of equity, from the enlarged principles upon which they act, to protect the rights and interests of creditors, give full effect to all the provisions, and exert their jurisdiction upon the same construction of these statutes, which is adopted by courts of law. They even go farther; and (as we shall

(l) Dig. Lib. 42, tit. 8, f. 6, § 11.

(m) Dig. Lib. 42, tit. 8, f. 1.

(n) Dig. Lib. 42, tit. 8, f. 1; id. f. 7.

(o) *Cadogan v. Kennett*, Cow, 432.

(p) Com. Dig. *Covin*, B. 2. The statutes of 50 Edw. 3, c. 6, and 3 Hen. 7, c. 4, expressly declare all gifts, &c., of goods and chattels intended to defraud creditors, to be null and void.

(q) *Jones v. Croucher*, 1 Sim. & Stu. 315.

(r) *Doe v. Manning*, 9 East, 59; *Buckle v. Mitchell*, 18 Ves. 110.

presently see) extend their aid to many cases not reached by these statutes.

§ 353. And, in the first place, let us consider the nature and operation of the statute of 13 Eliz. c. 5, as to creditors. The object of the legislature evidently was, to protect creditors from those frauds which are frequently practised by debtors, under the pretence of discharging a moral obligation; that is, under the pretence of making suitable provisions for wives, children, and other relations. Independently of the statute, no one can reasonably doubt that a gift or conveyance, which has neither a good nor a meritorious consideration to support it, ought not to be valid against creditors; for every man is bound to be just before he is generous (*s*); and the very fact that he makes a voluntary gift or conveyance to mere strangers to the prejudice of his creditors, affords a conclusive evidence that it is fraudulent. The statute, while it seems to protect the legal rights of creditors against the frauds of their debtors, anxiously excepts from such imputation the *bonâ fide* discharge of moral duties. It does not, therefore, declare all voluntary conveyances to be void; but only all fraudulent conveyances to be void. And whether a conveyance be fraudulent or not is declared to depend on its being made "upon good consideration and *bonâ fide*." It is not sufficient that it be upon good consideration or *bonâ fide*. It must be both. And, therefore, if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void as to creditors (*t*).

§ 354. This leads us to the inquiry, what are deemed good considerations in the contemplation of the statute. A good consideration is sometimes used in the sense of a consideration which is valid in point of law; and then it includes a meritorious, as well as a valuable consideration. But it is more frequently used in a sense contradistinguished from valuable; and then it imports a consideration of blood, or natural affection, as when a man grants an estate to a near relation merely founded upon motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems as an equivalent given for the grant, and it is, therefore, founded upon motives of justice (*u*). Deeds, made upon a good consideration only, are considered as merely voluntary; those made upon a valuable consideration are treated as compensatory. The words "good consideration," in the statute, may be properly construed to include both descriptions; for it cannot be doubted, that it meant to protect conveyances, made *bonâ fide* and

(*s*) *Copis v. Middleton*, 2 Mad. 428.

(*t*) *Twyne's Case*, 3 Co. 81; *Mathews v. Feaver*, 1 Cox, 278.

(*u*) Black. Comm. 297.

for valuable consideration, as well as those made *bonâ fide* upon the consideration of blood or affection (*x*).

§ 355. In regard to voluntary conveyances, they are unquestionably protected by the statute in all cases, where they do not break in upon the legal rights of creditors. But when they break in upon such rights, and so far as they have that effect, they are not permitted to avail against those rights. If a man, therefore, who is indebted, conveys property to his wife or children, such a conveyance is, or at least may be, within the statute; for, although the consideration is good, as between the parties, yet it is not, in contemplation of law, *bonâ fide*; for it is inconsistent with the good faith which a debtor owes to his creditors, to withdraw his property voluntarily from the satisfaction of their claims (*y*); and no man has the right to prefer the claims of affection to those of justice. This doctrine, however (as we shall presently see), requires, or at least may admit of, some qualification in relation to existing creditors, where the circumstances of the indebtedness and the conveyance repel any possible imputation of fraud, as where the conveyance is of a small property by a person of great wealth, and his debts bear a very small proportion to his actual means.

§ 356. But, at all events, the same doctrine does not apply to a man not indebted at the time, or in favour of subsequent creditors. There is nothing inequitable or unjust in a man's making a voluntary conveyance or gift, either to a wife, or to a child, or even to a stranger, if it is not, at the time, prejudicial to the rights of any other persons, or in furtherance of any meditated design of future fraud or injury to other persons (*z*).

§ 356a. It is perfectly clear, however, that the statute of 13 Eliz. renders void settlements which fraudulently withdraw assets from persons who may become creditors subsequent to its execution (*a*). The question to be determined in each case is the fraudulent effect of the conveyance, and this is necessarily largely a question of fact. It is impossible, therefore, to reconcile all the decisions depending upon the statute, or the language in which judges have expressed the grounds of their ruling, and still greater difficulty is presented when we strive to discover what matters are to be regarded as circumstances of evidence and what matters are to be treated as necessary conclusions. One thing appears to be clear, and that is the increasing advantage that the creditor enjoys under the later cases. An illusory considera-

(*x*) *Twyne's case*, 3 Co. 81; *Copis v. Middleton*, 2 Mad. 430.

(*y*) *Ibid.*

(*z*) *Townsend v. Windham*, 2 Ves. Sen. 11; *Holloway v. Millard*, 1 Mad. 414; *Battersbee v. Farrington*, 1 Swanst. 106, 113.

(*a*) *Ex parte Russell*, *In re Butterworth*, 18 Ch. D. 588; *In re Ridler*, *Ridler v. Ridler*, 22 Ch. D. 74; *Ex parte Gimblett*, *In re Lane Fox*, [1900] 2 Q. B. 508.

tion is not sufficient to save the conveyance if attacked, but it is not essential that the purchaser should show that he gave the highest market value (b).

§ 355*b*. Fraud, for the purposes of the statute of 13 Eliz. c. 5, is a matter of inference. "If a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute" (c). And even although the settlor is solvent at the time he makes the voluntary settlement, yet if he becomes insolvent within some short period after, the burden of proving that he was solvent at the time when he executed the settlement, will rest on the party who executed it, and not on the parties who seek to set it aside (d); and if the voluntary settlement is executed by a man who contemplates going into trade, or entering on a new trade, of which he has not had experience, and the issue of which he therefore knows to be uncertain, his subsequent creditors will be entitled to set the settlement aside, if in the settlement the bulk of the settlor's property is included (e).

§ 369. Having thus given the state of the law with regard to voluntary conveyances, we proceed to remark that a conveyance, even if for a valuable consideration, is not, under the statute of the 13 Eliz., valid in point of law from that circumstance alone. It must also be *bonâ fide*; for if it be made with intent to defraud or defeat creditors, it will be void, although there may, in the strictest sense, be a valuable, nay, an adequate, consideration. This doctrine was laid down in *Twyne's case* (3 Co. 81), and it has ever since been steadily adhered to. Cases have repeatedly been decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and, therefore, set aside (f). A debtor may deprive a creditor of the fruits of his judgment by way of execution by means of a sale for the full value of the goods (g).

§ 369*b*. In the next place, the statute 13 Eliz. c. 5 protects in express terms a conveyance if made "upon good consideration and

(b) *Mathews v. Feaver*, 1 Cox 278; *Copis v. Middleton*, 2 Mad. 410; *In re Ridler, Ridler v. Ridler*, 22 Ch. D. 74.

(c) *Freeman v. Pope*, L. R. 5 Ch. 538.

(d) *Townsend v. Westacott*, 2 Beav. 340; *Taylor v. Coenan*, 1 Ch. D. 636.

(e) *Mackay v. Douglas*, L. R. 14 Eq. 106; *Ex parte Russel, In re Butterworth*, 19 Ch. D. 588.

(f) *Cadogan v. Kennett*, Cowp. 434.

(g) *Wood v. Dixie*, 7 Q. B. 892; *Hale v. Saloon Omnibus Co.*, 4 Drew. 492; *Darvill v. Terry*, 6 H. & N. 807.

bonâ fide." A settlement is validated by a purchase for value of an interest limited by it by a person who has no notice that its validity could be successfully impugned (*h*).

§ 371. It may be added that, although voluntary conveyances are or may be void as to existing creditors, they are perfect and effectual as between the parties, and cannot be set aside by the grantor, if he should become dissatisfied with the transaction (*i*). It is his own folly to have made such a conveyance. They are not only valid as to the grantor, but also as to his heirs, and all other persons claiming under him in privity of estate with notice of the fraud (*k*). A conveyance of this sort (it has been said, with great truth and force) is void only as against creditors; and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent, and to this only, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditor, and the conveyance stands (*l*). And if a creditor is a party to such deed and acquiesces in it, he cannot afterwards avoid it; nor can any one claiming under him (*m*). Further if a man having made a voluntary settlement of land contracts to sell it, the vendee can compel a specific performance of the contract against him, but that he, under ordinary circumstances, cannot compel specific performance against the vendee (*n*). But if the vendee says he is willing to complete, on getting a good title, seeing that it is in the vendee's power to obtain a good title, specific performance can be enforced against the vendee (*o*).

§ 372. The circumstances under which a conveyance will be deemed purely voluntary, or will be deemed affected by a consideration valuable in itself, or in furtherance of an equitable obligation, are very important to be considered; but they more properly belong to a distinct treatise upon the nature and validity of settlements.

§ 373. In like manner, what circumstances, connected with voluntary or valuable conveyances, are badges of fraud, or raise presumptions of intentional bad faith, though very important ingredients in the exercise of equitable jurisdiction, fall rather within the scope of treatises on evidence, than of discussions touching jurisdiction (*p*). It may, however, be generally stated, that whatever would at law be deemed badges of fraud, or presumptions of ill faith, will be fully acted upon in courts of equity. But, on the other hand, it is by no means to be deemed a logical conclusion, that, because a transaction

(*h*) *Halifax Joint Stock Bank v. Gledhill*, [1891] 1 Ch. 31.

(*i*) *Petre v. Espinasse*, 2 Myl. & K. 496; *Bill v. Cureton*, 2 Myl. & K. 510.

(*k*) *Randall v. Phillips*, 3 Mason 378.

(*l*) Sir W. Grant, in *Curtis v. Price*, 12 Ves. 103.

(*m*) *Oliver v. King*, 8 De G. M. & G. 110. See *Ex parte Taylor, Sons & Co.*; *In re Brindley*, [1906] 1 K. B. 377.

(*n*) *Smith v. Garland*, 2 Meriv. 123.

(*o*) *Peter v. Nicolls*, L. R. 11 Eq 391.

(*p*) *Twyne's case*, 3 Co. 80.

could not be reached at law as fraudulent, therefore it would be equally safe against the scrutiny of a court of equity; for a court of equity requires a scrupulous good faith in transactions which the law might not repudiate. It acts upon conscience, and does not content itself with the narrower views of legal remedial justice.

§ 374. The question has been much discussed how far a settlement, made after marriage, in pursuance of an asserted parol agreement before marriage, is valid, as against creditors, in cases affected by the Statute of Frauds. There is no doubt, that such a settlement, made in pursuance of a prior valid written agreement, would be completely effectual against creditors. But the difficulty is, whether such a settlement, executed in pursuance of a parol contract, obligatory *in foro conscientiæ*, ought to be protected, when made, although it might not be capable of being enforced, if not made. Lord Thurlow seems to have favoured the view that the settlement would be valid (*q*); on the other hand we have the opposite view maintained by Sir Thomas Plumer, M.R. (*r*), and Lord Cranworth (*s*). Certainly Lord Thurlow's view is more consistent with the accepted interpretation that the contract exists independently of the writing, and that the Statute of Frauds is concerned only with the proof of the contract. Perhaps the true solution will follow upon the lines of lost evidence. If written proof has existed but is lost, then parol evidence may be given of the lost instrument (*t*), but at the same time the evidence should be examined with the greatest care, and treated with suspicion (*u*).

§ 375. The same policy, of affording protection to the rights of creditors, pervaded the provisions of the statute of the 3rd and 4th of Will. & Mary, c. 14, respecting devises in fraud of creditors, now replaced by the Debts Recovery Act, 1830, which has an enlarged scope.

§ 377. These cases of interposition in favour of creditors being founded upon the provisions of positive statutes, a question was made at an early day whether they were exclusively cognizable at law; or they could be carried into effect also in equity. The jurisdiction of courts of equity is now firmly established, for it extends to cases of fraud, whether provided against by statute or not. And, indeed, the remedial justice of a court of equity in many cases arising under these statutes, is the only effectual one which can be administered; as that of courts of law must often fail from the want of adequate powers to reach or redress the mischief.

§ 378. There are other cases of constructive frauds against

(*q*) *Dundas v. Dutens*, 1 Ves. Jun. 196.

(*r*) *Battersbee v. Farrington*, 1 Swanst. 106.

(*s*) *Warden v. Jones*, 2 De G. & J. 276.

(*t*) *Read v. Price*, [1909] 2 K. B. 724.

(*u*) *Nichol v. Bestwick*, 28 L. J. Ex. 4.

creditors which the wholesome moral justice of the law has equally discredited and denounced. We refer to that not unfrequent class of cases in which, upon the failure or insolvency of their debtors, some creditors have, by secret compositions, obtained undue advantages, and thus decoyed other innocent and unsuspecting creditors into signing deeds of composition, which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors; when, in fact, there was a designed or actual imposition upon all but the favoured few. The purport of a composition or trust-deed, in cases of insolvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors, according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors, who become parties, generally agree to release all their debts beyond what the funds will satisfy. Now, it is obvious that, in all transactions of this sort, the utmost good faith is required; and the very circumstance that other creditors, of known reputation and standing, have already become parties to the deed, will operate as a strong inducement to others to act in the same way. But if the signatures of such prior creditors have been procured by secret arrangements with them, more favourable to them than the general terms of the composition deed warrant, those creditors really act (as has been said by a very significant although a homely figure) as decoy-ducks upon the rest. They hold out false colours to draw in others to their loss and ruin.

§ 379. The doctrine was familiar in courts of law, and was not peculiar to courts of equity (x), that such secret arrangements are utterly void, and ought not to be enforced, even against the assenting debtor, or his sureties, or his friends (y). There is great wisdom and deep policy in the doctrine, and it is founded in the best of all protective policy, that which acts by way of precaution rather than by mere remedial justice; for it has a strong tendency to suppress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted not for the sake of the debtor, for no deceit or oppression may have been practised upon him, but for the sake of honest, and humane, and unsuspecting creditors. And, hence, the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favoured creditors, or whether he has been a mere volunteer, offering his services, and aiding in the intended deception. Such secret bargains are deemed incapable of being enforced or confirmed, but money paid under them is not recoverable back, except under the provisions of the Bankruptcy Acts,

(x) *Cockshott v. Bennett*, 2 T. R. 763.

(y) *Jackman v. Mitchell*, 13 Ves 581; *Cullingworth v. Lloyd*, 2 Beav. 385; *Ex parte Milner*, *In re Milner*, 15 Q. B. D. 605.

as a fraudulent preference, as it is a voluntary payment (*z*). And it is wholly immaterial whether such secret bargains give to the favoured creditors a larger sum, or an additional security or advantage, or only misrepresent some important fact; for the effect upon other creditors is precisely the same in each of these cases. They are misled into an act to which they might not otherwise have assented (*a*). The transaction is void whether the collateral advantage is extorted from the debtor, or is provided by a third party (*b*). The principle only applies to cases of collective bargaining on the footing of equality; a creditor may make an independent bargain with a debtor who is seeking to compromise the claims of his creditors individually (*c*).

§ 380. In equity, any agreement, made by a bankrupt debtor in fraud of his creditors, will be held void, and will be rescinded, upon the ground of public policy, whenever it comes before a court of equity, even though the suit happens to be at the instance of the insolvent himself (*d*), unless the objection appears on the face of the instrument (*e*).

§ 381. In concluding this discussion, so far as it regards creditors, it is proper to be remarked, that although voluntary and other conveyances, in fraud of creditors, are thus declared to be utterly void; yet, they are so, only so far as the original parties and their privies, and others claiming under them, who have notice of the fraud, are concerned. For *bonâ fide* purchasers for a valuable consideration, without notice of the fraudulent or voluntary grant, are of such high consideration, that they will be protected, as well at law as in equity, in their purchases (*f*). It would be plainly inequitable, that a party who has, *bonâ fide*, paid his money upon the faith of a good title, should be defeated by any creditor of the original grantor, who has no superior equity, since it would be impossible for him to guard himself against such latent frauds. The policy of the law, therefore, which favours the security of titles, as conducive to the public good, would be subverted, if a creditor, having no lien upon the property, should yet be permitted to avail himself of the priority of his debt, to defeat such a *bonâ fide* purchaser. Where the parties are equally meritorious, and equally innocent, the known maxim of courts of equity is, *Qui prior est in tempore, potior est in jure*; he is to be preferred, who has

(*z*) *Wilson v. Ray*, 10 A. & E. 82.

(*a*) *Knight v. Hunt*, 5 Bing. 432; *Cullingworth v. Lloyd*, 2 Beav. 385; *McKewan v. Sanderson*, L. R. 20 Eq. 65.

(*b*) *Knight v. Hunt*, 5 Bing. 432; *Farmers' Mart, Ltd. v. Milner*, [1915] A. C. 106.

(*c*) *Ellis v. McHenry, Levita's Claim*, [1894] 3 Ch. 365. See *Boyd v. Hind*, 1 H. & N. 938.

(*d*) *Jackman v. Mitchell*, 13 Ves. 581; *McNeill v. Cahill*, 2 Bligh. 228; *Mare v. Sandford*, 1 Giff. 288; *Wood v. Barker*, L. R. 1 Eq. 139.

(*e*) *Simpson v. Lord Howden*, 3 M. & Cr. 97.

(*f*) *Prodgers v. Langham*, 1 Sid. 133; *Halifax Joint Stock Bank v. Gledhill*, [1891] 1 Ch. 31.

acquired the first title. This point, however, will naturally present itself in other aspects, when we come to the consideration of the general protection, afforded by courts of equity, to purchasers standing in such a predicament.

§ 382. Other underhand agreements, which operate as a fraud upon third persons, may easily be suggested, to which the same remedial justice has been applied. Thus, where a father, upon the marriage of his daughter, entered into a covenant, that upon his death he would leave her certain tenements, and that he would, also by his will, give and leave her a full and equal share, with her brother and sister, of all his personal estate; and he afterwards, during his life, transferred to his son a very large portion of his personal property, consisting of public stock, but retained the dividends for his life; it was held, that the transfer was void, as a fraud upon the marriage articles; and the son was compelled to account for the same (*g*). Covenants of this nature are proper in themselves, and ought to be honourably observed. They ought not to be, and indeed are not, construed to prohibit the father from making, during his lifetime, any dispositions of his personal property among children, more favourable to one than another. But they do prohibit him from doing any acts which are designed to defeat and defraud the covenant. He may, if he pleases, make a gift *bonâ fide* to a child; but then it must be an absolute and unqualified gift, which surrenders all his own interest, and not a mere reversionary gift which saves the income to himself during his own life (*h*).

§ 383. So if a friend should advance money to purchase goods for another, or to relieve another from the pressure of his necessities, and the other parties interested should enter into a private agreement over and beyond that with which the friend is made acquainted, such an agreement will be void at law, as well as in equity; for the friend is drawn in to make the advance by false colours held out to him, and under a supposition that he is acquainted with all the facts (*i*). So the guaranty of the payment of a debt, procured from a friend upon the omission by the parties to disclose material circumstances, is a virtual fraud upon him, and avoids the contract (*k*).

§ 384. Another class of constructive frauds of a large extent, and over which courts of equity exercise an exclusive and very salutary jurisdiction, consists of those where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract, injurious to his own rights or interests. This

(*g*) *Jones v. Martin*, 5 Ves. 265 n.; *Randall v. Willis*, 5 Ves. 261; 8 Bro. Parl. C. 242, by Tomlins.

(*h*) *Logan v. Wienholt*, 1 Cl. & F. 611.

(*i*) *Jackson v. Duchaise*, 3 T. R. 551.

(*k*) *Pidcock v. Bishop*, 3 B. & C. 605; *Smith v. Bank of Scotland*, 1 Dow, 272; *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72.

subject has been partly treated before; but it should be again brought under our notice in this connection (*l*). No man can reasonably doubt, that if a party, by the wilful suggestion of a falsehood, is the cause of prejudice to another, who has a right to a full and correct representation of the fact, his claim ought in conscience to be postponed, to that of the person whose confidence was induced by his representation. And there can be no real difference between an express representation, and one that is naturally or necessarily implied from the circumstances. The wholesome maxim of the law upon this subject, is, that a party who enables another to commit a fraud is answerable for the consequences (*m*); and, the maxim so often cited, *Fraus est celare fraudem*, is, with proper limitations in its application, a rule of general justice.

§ 385. In many cases, a man may innocently be silent; for, as has often been observed, *Aliud est tacere, aliud celare*. But, in other cases, a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. Thus, if a man, having a title to an estate, which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title of the actual vendor is good, the true owner, so standing by and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase (*n*). So, if a man should stand by, and see another person, as grantor, execute a deed of conveyance of land belonging to himself, and, knowing the facts, should sign his name as a witness, he would in equity be bound by the conveyance (*o*). So, if a party knowing himself to have a title to an estate (*p*), should stand by, and allow another, whom he knows believes himself to be entitled, to expend money upon the estate, without giving him notice, he would not be permitted by a court of equity to assert that title against such purchaser, at least not without fully indemnifying him for all his expenditure (*q*). The same rule has been applied both at law and in equity, where the owner of chattels, with a full knowledge of his own title, has permitted another person to deal with these chattels as his own, in his transactions with third persons, who have bargained and acted in the confidence that the chattels were the property of the

(*l*) *Ante*, §§ 192-204.

(*m*) *Bac. Max.* 16.

(*n*) *Savage v. Foster*, 9 Mod. 35. Although the author and most equity practitioners class this as fraud, it is the familiar common law doctrine of estoppel. *Pickard v. Sears*, 6 A. & E. 474; *Freeman v. Cooke*, 2 Ex. 654.

(*o*) *Teesdale v. Teesdale*, Sel. Ch. Cas. 59.

(*p*) *Bell v. Marsh*, [1903] 1 Ch. 528.

(*q*) *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Willmott v. Barber*, 15 Ch. D. 96; *Sumpter v. Hedges*, [1898] 1 Q. B. 673.

person with whom they dealt (*r*). Cases of this sort are viewed with so much disfavour by courts of equity, that disability will not constitute any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practise deception or cheats on other innocent persons (*s*).

§ 386. In order to justify the application of this cogent moral principle, it is indispensable that the party so standing by and concealing his rights should be fully apprised of them, and should, by his conduct or gross negligence, encourage or influence the purchase; for if he is wholly ignorant of his rights, or the purchaser knows them, or, if his acts, or silence, or negligence, do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part.

§ 387. There are indeed old cases, where it has been held that ignorance of title will not excuse a party; for, if he actually misleads the purchaser by his own representations, although innocently, the maxim is applied to him, that, where one of two innocent persons must suffer, he shall suffer who, by his own acts, occasioned the confidence and the loss (*t*). But this doctrine of the incidence of the loss is no longer recognised (*u*). The true doctrine is either that there is an estoppel, or that the negotiations have proceeded upon the assumption that a certain state of circumstances exist, which is in truth a warranty or condition.

§ 391. In all this class of cases, the doctrine proceeds upon the ground of constructive fraud, or of gross negligence. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief (*x*). It has, accordingly, been laid down by a very learned judge, that the cases on this subject go to this result only, that there must be positive fraud, or concealment, or negligence so gross as to amount to constructive fraud (*y*). And, if the intention be fraudulent, although not exactly pointing to the object accomplished; yet the party will be bound to the same extent as if it had been exactly so pointed (*z*).

§ 393. What circumstances will amount to undue concealment, or to misrepresentation, in cases of this sort, is a point more fit for a treatise of evidence, than for one of mere jurisdiction. But it has

(*r*) *Nicholson v. Hooper*, 4 Myl. & Cr. 179; *Pickard v. Sears*, 6 A. & E. 474.

(*s*) *Savage v. Foster*, 9 Mod. 35; Sugden, Vendors and Purch., ch. 16, p. 262, 9th edit.; *post*, § 387.

(*t*) See 3 P. Will. 74, Mr. Cox's note; *Pearson v. Morgan*, 2 Bro. C. C. 388.

(*u*) *Scholfield v. Earl of Londesborough*, [1896] A. C. 514; *Farquharson Bros. & Co. v. King*, [1902] A. C. 325.

(*x*) *Beckett v. Cordley*, 1 Bro. C. C. 353; *Tourle v. Rand*, 2 Bro. C. C. 652.

(*y*) *Evans v. Bicknell*, 6 Ves. 190, 191, 192; *Hewitt v. Loosemore*, 9 Hare 449; Lord St. Leonards, V. and P. 14th edit. 755.

(*z*) *Evans v. Bicknell*, 6 Ves. 191, 192; *Beckett v. Cordley*, 1 Bro. C. C. 357, 1 Fonbl. Eq. B. 1, ch. 3, § 4; *Plumb v. Fluitt*, 2 Anst. 432, 440.

been held, that a first mortgagee's merely allowing the mortgagor to have the title-deeds, or a first mortgagee's witnessing a second mortgage-deed, but not knowing the contents, or even concealing from a second mortgagee information of a prior mortgage when he made application therefor, the intention of the party applying to lend money not being made known, are not of themselves sufficient to affect the first mortgagee with constructive fraud (a). There must be other ingredients to give colour and body to these circumstances; for they may be compatible with entire innocence of intention and object (b). Nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee, in the mortgagor's retaining the title-deeds, is now deemed a sufficient reason for postponing his priority. And, in regard to the other acts above stated, they must be done under circumstances which show a like concurrence and co-operation in some deceit upon the second mortgagee (c).

§ 393a. The doctrine was discussed in an exhaustive judgment of Fry, L.J., delivering the judgment of the whole Court of Appeal: "The authorities which we have reviewed appear to us to justify the following conclusions:—(1) That the court will postpone the prior legal estate to a subsequent equitable estate: (a) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title-deeds may be, and in some cases has been, held sufficient evidence, where such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate.

(a) *West v. Reid*, 2 Hare 249; *Colyer v. Finch*, 5 H. L. C. 905. In the first case Vice-Chancellor Wigram said: "In short, let the doctrine of constructive notice be extended to all cases (it is, in fact, more confined in *Plumb v. Fluitt*, *Evans v. Bicknell*, *Cothay v. Sydenham*, and other cases), but let it be extended to all cases in which the purchaser has notice that the property is affected, or has notice of facts raising a presumption that it is so, and the doctrine is reasonable, though it may sometimes operate with severity. But once transgress the limits which that statement of the rule imposes,—once admit that a purchaser is to be affected with constructive notice of the contents of instruments not necessary to, nor presumptively connected with the title, only because by possibility they *may* affect it (for that may be predicted of almost any instrument); and it is impossible, in sound reasoning, to stop short of the conclusion that every purchaser is affected with constructive notice of the contents of every instrument, of the mere existence of which he has notice,—a purchaser must be presumed to investigate the title of the property he purchases, and may, therefore, be presumed to have examined every instrument forming a link, directly or by inference, in that title; and that presumption I take to be the foundation of the whole doctrine. But it is impossible to presume that a purchaser examines instruments not directly or presumptively connected with the title, because they *may* by possibility affect it."

(b) *Evans v. Bicknell*, 6 Ves. 172, 182, 190, 191, 192; *Plumb v. Fluitt*, 2 Anst. 432; *Hewitt v. Loosemore*, 9 Hare 449; *Barnett v. Weston*, 12 Ves. 133.

(c) *Peter v. Russell*, 2 Vern. 726, and Mr. Raithby's note (1).

But (2) that the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner" (d). If, on the other hand, a purchaser having bargained for a better title and getting nothing but an equitable title, may afterwards get in a legal title, and may hold it, though, during the interval between the payment and the getting in the legal title, he may have had notice of some prior dealing, inconsistent with the good faith of the dealing with himself (e). And, if two innocent persons take equitable mortgages from a fraudulent mortgagor, mere carelessness or want of prudence on the part of the first mortgagee in taking his security is not sufficient to postpone him to the second; for that purpose, the negligence must be "gross," that is, so great as to make the first mortgagee responsible for the fraud committed on the second mortgagee; but, if the second mortgagee obtains a legal title he will be preferred to the first mortgagee, unless the legal estate has been obtained in breach of some equity which the first purchaser possesses (f).

§ 394. It is curious to trace how nearly the Roman law approaches that of England on this subject; thus demonstrating that if they had not a common origin, at least each is derived from that strong sense of justice which must pervade all enlightened communities. It is an acknowledged principle of the Roman jurisprudence, that a creditor who consents to the sale, donation, or other alienation of the property of his debtor, which is pledged or mortgaged for his debt, cannot assert his title against the purchaser, unless he reserves it; for his loss of title cannot, under such circumstances, be asserted to be to his prejudice; since it is by his consent; and otherwise the purchaser would be deceived into the bargain. "Creditor, qui permittit rem venire, pignus dimittit (g). Si consensit venditioni creditor, liberatur hypotheca (h). Si in venditione pignoris consenserit creditor, vel ut debitor hanc rem permutet, vel donet, vel in dotem det; dicendum erit, pignus liberari, nisi salvâ causa pignoris sui, consensit vel venditioni vel cæteris" (i). But as to what shall be deemed a consent, the Roman law is very guarded. For it is there said, that we are not to take for a consent of the creditor to an alienation of the pledge, the knowledge which he may have of it; nor the silence which he may keep after he knows it; as, if he knows that his debtor is about selling a house, which is mortgaged to him, and he says nothing

(d) *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch. D. 494. See *Farrand v. Yorkshire Bank*, 40 Ch. D. 182. See also *Carritt v. Real & Personal Advance Co.*, 42 Ch. D. 263; *Walker v. Limon*, [1907] 2 Ch. 104.

(e) *Blackwood v. London Chartered Bank of Australia*, L. R. 5 P. C. 111; *Taylor v. Russell*, [1892] A. C. 244.

(f) *Phillips v. Phillips*, 4 De G. F. & J. 208; *Taylor v. Russell*, [1892] A. C. 244.

(g) Dig. Lib. 50, tit. 17, f. 158.

(h) Dig. Lib. 20, tit. 6, f. 7; Pothier, Pand. Lib. 20, tit. 6, art. 2, n. 21.

(i) Dig. Lib. 20, f. 4, § 1.

about it. But, in order to deprive him of his right, it is necessary that it should appear by some act that he knows what is doing to his prejudice, and consents to it; or, that there is some ground to charge him with dishonesty for not having declared his right when he was under an obligation to do it, by which the purchaser was misled. Thus, if upon the alienation, the debtor declares that the property is not encumbered, and the creditor knowingly signs the contract, as a party or witness, thereby rendering himself an accomplice in the false affirmation, he will be bound by the alienation. But the mere signature of the creditor, as a witness to a contract of alienation, will not of itself bind him, unless there are circumstances to show that he knew the contents, and acted disingenuously and dishonestly by the purchaser (*k*). “Non videtur consensisse creditor, si, sciente eo, debitor rem vendiderit, cum ideo passus est venire, quod sciebat, ubique pignus sibi durare. Sed si subscripserit forte in tabulis emptionis consensisse videtur, nisi manifest appareat deceptum esse” (*l*).

§ 395. Another class of constructive frauds consists of those where a person purchases with full notice of the legal or equitable title of other persons to the same property. In such cases he will not be permitted to protect himself against such claims; but his own title will be postponed, and made subservient to theirs (*m*). It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes, by such conduct, *particeps criminis* with the fraudulent grantor; and the rule of equity, as well as of law, is, “Dolus et fraus nemini patrocinari debent” (*n*). And in all such cases of purchasers with notice, courts of equity will hold the purchaser a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat (*o*). Thus, if title-deeds should be deposited as a security for money (which would operate as an equitable mortgage), and a creditor, knowing the fact, should subsequently take a mortgage of the same property, he would be postponed to the equitable mortgage of the prior creditor; and the notice would raise a trust in him to the amount of such equitable mortgage (*p*). So, if a mortgagee, with notice of a trust, should get a conveyance from the trustee, in order to protect his mortgage, he would not be allowed to derive any benefit from it; but he would be held to be subject to the original trust, in the same manner as the trustee. For, it has

(*k*) Domat, B. 3, tit. 1, § 7, art. 15, and Strahan's note.

(*l*) Dig. Lib. 20, tit. 6, f. 8, § 15; Pothier, Pand. Lib. 20, tit. 6, art. 2, n. 26, 27.

(*m*) *Eyre v. Dolphin*, 2 Ball & B. 290; *Trinidad Asphalte Co. v. Coryat*, [1896] A. C. 587. The anomalous case of a doweress—see *Maundrell v. Maundrell*, 10 Ves. 246—is now obsolete; 8 & 9 Vict. c. 112 (the Satisfied Terms Act).

(*n*) 3 Co. 78.

(*o*) *Maundrell v. Maundrell*, 10 Ves. 260, 261, 270.

(*p*) *Birch v. Ellames*, 2 Anst. 427; *Hiern v. Mill*, 13 Ves. 114; *Agra Bank v. Barry*, L. R. 7 H. L. 135.

been significantly said, that although a purchaser may buy an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking of a conveyance from a trustee, with notice of the trust; for he hereby becomes a trustee; and he must not, to get a plank to save himself, be guilty of a breach of trust (*q*). But a trust or equity, to affect the conscience of him who has got in the legal estate, must be a trust or equity, not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up (*r*).

§ 396. The same principle applies to cases of a contract to sell lands, or to grant leases thereof. If a subsequent purchaser has notice of the contract, he is liable to the same equity, and stands in the same place, and is bound to do the same acts, which the person who contracted, and whom he represents, would be bound to do (*s*).

§ 397. It is upon the same ground, that, in counties where the registration of conveyances is required, in order to make them perfect titles against subsequent purchasers, if a subsequent purchaser has notice, at the time of his purchase, of any prior unregistered conveyance, he shall not be permitted to avail himself of his title against that prior conveyance (*t*). The object of all acts of this sort is, to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances. But where such purchasers and mortgagees have notice of any prior conveyance, it is impossible to hold that it is a secret conveyance, by which they are prejudiced. On the other hand, the neglect to register a prior conveyance is often a matter of mistake, or of overweening confidence in the grantor; and it would be a manifest fraud, to allow him to avail himself of the power, by any connivance with others, to defeat such prior conveyance (*u*). The ground of the doctrine is (as Lord Hardwicke has remarked) plainly this: "That the taking of a legal estate, after notice of a prior right, makes a person a *malâ fide* purchaser; and not that he is not a purchaser for a valuable consideration in every

(*q*) *Saunders v. Dehew*, 2 Vern. 271; *Timson v. Ramsbottom*, 2 Keen 35. This is sometimes termed the *tabula in naufragio*, and must be limited as in the subsequent text.

(*r*) *Taylor v. Russell*, [1892] A. C. 244.

(*s*) *Crofton v. Ormsby*, 2 Scho. & L. 583; *Daniels v. Davison*, 16 Ves. 249; 17 Ves. 433; *Allen v. Anthony*, 1 Mer. 282.

(*t*) These are the Yorkshire Registry Acts, 1884 and 1885, 7 Anne, c. 20, affecting the County of Middlesex. By the 54 & 55 Vict. c. 64, the Middlesex Registry has been transferred to the Land Registry established under the Land Transfer Act, 1875. There is also a small district affected by the 15 Chas. II. c. 17, commonly known as the Bedford Level Act. *Le Neve v. Le Neve*, 3 Atk. 646; *Rolland v. Hart*, L. R. 6 Ch. 678.

(*u*) *Le Neve v. Le Neve*, 3 Atk. 646; *Agra Bank v. Barry*, L. R. 7 H. L. 135; *Lee v. Clutton*, 46 L. J. Ch. 48. See *Benham v. Keane*, 3 De G. F. & J. 318; *Lord Ashburton v. Nocton*, [1915] 1 Ch. 274.

other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate; and, after knowing that, he takes away the right of another person, by getting the legal title (x). And this exactly agrees with the definition of the civil law of *dolus malus* "(y). "Now, if a person does not stop his hand, but gets the legal estate, when he knows the equity was in another *machinatur ad circumveniendum* "(z).

§ 398. This doctrine, as to postponing registered to unregistered conveyances upon the ground of notice, has broken in upon the policy of the Registration Acts in no small degree; for a registered conveyance stands upon a different footing from an ordinary conveyance. It has, indeed, been greatly doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance. But they have said that fraud shall not be permitted to prevail. There is, however, this qualification upon the doctrine, that it shall be available only in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance, in prejudice to the known title of the other party (a).

§ 399. What shall constitute notice, in cases of subsequent purchasers, is a point of some nicety, and resolves itself, sometimes into matter of fact, and sometimes into matter of law (b). Notice may be either actual and positive, or it may be implied and constructive (c). Actual notice requires no definition; for in that case knowledge of the fact is brought directly home to the party. Constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the court will not even allow of its being controverted (d). There must not be, in the language of one very able judge, "fraudulent and wilful blindness" or "fraudulent blindness" (e). Or, as has been elsewhere said by the same authority, constructive notice is knowledge imputed by the court on presumption, too strong to be rebutted, that the knowledge must have been communicated (f).

(x) *Le Neve v. Le Neve*, 3 Atk. 646, and cases before cited. So in the late case of *Kettlewell v. Watson*, 26 Ch. D. 501, it was held that a purchaser of land in a registered county is bound to inquire for and examine the deed and documents, memorials of which are registered.

(y) Dig. Lib. 4, tit. 3. f. 2; *ibid.* Lib. 2, tit. 14, § 9.

(z) *Le Neve v. Le Neve*, 3 Atk. 646.

(a) *Wyatt v. Barwell*, 19 Ves. 439; *Chadwick v. Turner*, L. R. 1 Ch. 310; *Rolland v. Hart*, L. R. 6 Ch. 678; *Lee v. Clutton*, 46 L. J. Ch. 48.

(b) See *post*, § 1047, 1057.

(c) In a treatise like the present, it is impracticable to do more than to glance at topics of this nature. The learned reader will find full information on the subject in treatises which profess to examine it at large. See Lord St. Leonards' *Vendors and Purchasers*, 14th ed. ch. 22, § 4, p. 727.

(d) *Plumb v. Fluitt*, 2 Anst. 438, *per* Eyre, C.B.

(e) *Jones v. Smith*, 1 Hare, at pp. 56 and 60, *per* Wigram, V.-C.

(f) *Hewitt v. Loosemore*, 9 Hare 449.

§ 400. An illustration of this doctrine of constructive notice is where the party has possession or knowledge of a deed under which he claims his title, and it recites another deed which shows a title in some other person; there the court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it (*g*). And generally it may be stated, as a rule on this subject, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact (*h*). So the purchaser is, in like manner, supposed to have knowledge of the instrument under which the party with whom he contracts, as executor, or trustee, or appointee, derives his power (*i*). Indeed, the doctrine is still broader; for, whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons), is, in equity, held to be good notice to bind him (*k*). Thus, notice of a lease will be notice of its contents (*l*). So, if a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate (*m*) which these tenants have, and, therefore, he is affected with notice of all the facts as to their estates. It is only a person in possession who can enforce his rights, for inquiry would produce an answer defining his claim, but a purchaser is not fixed with notice of the proprietary rights of a person under whom the party in possession claims, still less of a stranger to the title under which the party in possession claims (*n*).

§ 400a. The text of the learned author has not been modified in any material respect in the two preceding sections. Modern practice divides notice into three categories—actual, constructive, and imputed. Actual notice is knowledge acquired personally by the party who is fixed with notice; constructive notice is notice of facts or deductions which a party is deemed to have acquired by reason of his knowledge or actual notice of other facts; imputed notice (*o*), which is sometimes, but inaccurately, termed constructive notice, is that which the law imputes to a party who employs an agent, and the notice which the agent has

(*g*) *Hewitt v. Loosemore*, 9 Hare 449.

(*h*) *Parker v. Brooke*, 9 Ves. 583; *Smith v. Capron*, 7 Hare 185; *Patman v. Harland*, 17 Ch. D. 353. This doctrine, however, is to be received with some qualifications. For though a deed disclosing a trust is in the chain of title, and would have to be shown in defence of an action at law, the defence of *bonâ fide* purchaser without notice will avail in equity, where knowledge of it was fraudulently withheld. *Pilcher v. Rawlins*, L. R. 7 Ch. 259.

(*i*) *Mead v. Lord Orrery*, 3 Atk. 238; Sugden on Vendors and Purchasers, ch. 17, § 2. See *post*, § 422.

(*k*) *Parker v. Brooke*, 9 Ves. 583; *Daniels v. Davison*, 16 Ves. 250; 17 Ves. 433; *Eyre v. Dolphin*, 2 Ball & B. 290.

(*l*) *Hall v. Smith*, 14 Ves. 426.

(*m*) *Daniels v. Davison*, 16 Ves. 249; 17 Ves. 433; *Allen v. Anthony*, 1 Meriv. 282.

(*n*) *Miles v. Langley*, 1 Russ. & M. 39, affirmed; 2 Russ. & M. 626; *Hunt v. Luck*, [1902] 1 Ch. 428.

(*o*) *Espin v. Pemberton*, 3 De G. & J. 547, 554, *per* Lord Chelmsford, L.C.

may itself be actual or constructive. The doctrine of imputed notice is not one peculiar to courts of equity. "If a party employs an agent who has full knowledge of circumstances, it must be presumed the principal has the same knowledge" (p). But the converse does not hold good in equity, and at the common law a party with knowledge could not rely upon the ignorance of his agent (q).

§ 400b. By a series of refinements the Court of Chancery had come to fix parties who employed an agent with constructive notice of facts which the agent might once have known, but had certainly long since forgotten. To restore the law within limits that should not work an injustice to purchasers was partly the object of section 3 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which now regulates the circumstances under which a purchaser shall be deemed to be fixed with notice. It is in these terms—“(1) a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (i.) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. (2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner, and to the same extent, as if this section had not been enacted. (3) A purchaser shall not be affected by reason of anything in this section contained where he would not have been so affected if this section had not been enacted. (4) This section applies to purchases made either before or after the commencement of this Act (r). And by the definition clause (section 1) of the same statute: “purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser.” Section 3 does not affect the test of liability in equivocal cases, namely, that a person is absolved if he fails to pursue an inquiry acting in reliance upon an answer which is in fact false, but that he is fixed with liability if he abstains from all inquiry,

(p) *Doe d. Whitaker v. Hales*, 7 Bing. 322, 325, *per* Tindal, Ch. J.

(q) *Levick v. Epsom & Leatherhead Ry.*, 1 L. T. (N.S.) 60.

(r) *In re Cousins*, 31 Ch. D. 671.

for it cannot be assumed that a false answer or one leading to no result would have been returned (*s*).

§ 400 *c*. The critical times for receiving notice for the purpose of affecting a purchaser with the proprietary rights of another are the parting with his money, and the taking of his conveyance (*t*).

§ 401. How far the registration of a conveyance, in countries where such registration is authorized and required by law, shall operate as constructive notice to subsequent purchasers, by mere presumption of law, independent of any actual notice, has been much discussed. It is not doubted that a prior conveyance, duly registered, operates to give full effect to the legal and equitable estate conveyed thereby, against subsequent conveyances of the same legal and equitable estate (*u*). But the question becomes important as to other collateral effects, such as defeating the right of tacking of mortgages, and other incidentally accruing equities between the different purchasers. For, if the mere registry, in such cases, without actual knowledge of the conveyance, operates as constructive notice, it shuts out many of those equities which otherwise might have an obligatory priority. It has been truly remarked, that there is a material difference between actual notice and the operation of the Registry Acts. Actual notice may bind the conscience of the parties; the operation of the Registry Acts may bind their title, but not their conscience (*x*).

§ 402. The doctrine seems at length to be settled, that the mere registration of a conveyance shall not be deemed constructive notice to subsequent purchasers, but that actual notice must be brought home to the party, amounting to fraud (*y*). The subject certainly is attended with no inconsiderable difficulty. Some learned judges have expressed a doubt, whether courts of equity ought not to have said, that in all cases of a public registry, which is a known repository for conveyances, a subsequent purchaser ought to search, or be bound by notice of the registry, in the same way as he would be by a decree in equity, or by a judgment at law (*z*). Other learned judges have intimated a different opinion; assigning as a reason, that if the registration of the conveyance should be held constructive notice, it must be notice of all that is contained in the conveyance; and, then,

(*s*) *Smith v. Jones*, 1 Hare 43; affirmed, 1 Ph. 244; *Ware v. Lord Egmont*, 4 De G. M. & G. 460; *Bailey v. Barnes*, [1894] 1 Ch. 25.

(*t*) *Jackson v. Rowe*, 4 Russ. 514; further proceedings, 3 L. J. O. S. Ch. 32; *Collinson v. Lister*, 7 De G. M. & G. 634.

(*u*) *Wrightson v. Hudson*, 2 Eq. Abr. 609, pl. 7.

(*x*) *Underwood v. Courtown*, 2 Sch. & Lefr. 66. See *Latouche v. Dunsany*, 1 Sch. & Lefr. 137.

(*y*) *Wyatt v. Barwell*, 19 Ves. 435; *Chadwick v. Turner*, L. R. 1 Ch. 310; *Rolland v. Hart*, L. R. 6 Ch. 678; *Lee v. Clutton*, 46 L. J. Ch. 48.

(*z*) *Morecock v. Dickens*, Ambler 480; *Hine v. Dodd*, 2 Atk. 275; Sugden, Vendors and Purchasers, ch. 16, 17.

subsequent purchasers would be bound to inquire after the contents, the inconveniences of which cannot but be deemed exceedingly great (a). The question seems first to have arisen in a case of the tacking of mortgages, about the year 1730; and it was then decided, by Lord Chancellor King, that the mere registration of a second mortgage did not prevent a prior mortgagee from tacking a third mortgage, when he had no actual notice of the existence of the second mortgage (b). This decision has ever since been steadily adhered to, perhaps more from its having become a rule of property, than from a sense of its intrinsic propriety.

§ 405. It is upon different grounds, that a purchase made of land (c) actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be so far bound by the judgment or decree as not to be entitled to defeat the main object of the suit (d).

§ 406. Ordinarily, it is true that the judgment of a court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of an action, is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the action (e). Where there is a real and fair purchase, without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, *pendente lite, nihil innovetur*; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation (f). As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them (g). By the 2 & 3 Vict. c. 11, s. 7, it was enacted that a *lis pendens* should not bind a purchaser or mortgagee without express notice thereof, unless and until it is duly registered, and the registration to be binding must be repeated every five years. And the court before whom the litigation is pending may, by 30 & 31 Vict. c. 47, s. 2, on

(a) *Latouche v. Dunsany*, 1 Sch. & Lefr. 157; *Underwood v. Courtown*, 2 Sch. & Lefr. 64, 66; *Pentland v. Stokes*, 2 Ball & B. 75.

(b) *Bedford v. Backhouse*, 2 Eq. Abr. 615, pl. 12; s.p. *Wrightson v. Hudson*, 2 Eq. Abr. 609, pl. 7; *Cator v. Cooly*, 1 Cox 182; *Wiseman v. Westland*, 1 Y. & J. 117.

(c) *Wigram v. Buckley*, [1894] 3 Ch. 483.

(d) *Bellamy v. Sabine*, 1 De G. & J. 566; *Price v. Price*, 35 Ch. D. 297.

(e) *Bishop of Winchester v. Paine*, 11 Ves. 195; *Metcalf v. Pulvertoft*, 2 Ves. & B. 205.

(f) Co. Litt. 224 b; *Metcalf v. Pulvertoft*, 2 Ves. & B. 199; *Gaskeld v. Durdin*, 2 Ball & B. 169; *Price v. Price*, 35 Ch. D. 297.

(g) *Bishop of Winchester v. Paine*, 11 Ves. 194.

the determination of the *lis pendens*, or even during pendency, if satisfied that the litigation is not prosecuted *bonâ fide*, order the registration to be vacated without the consent of the party by whom the *lis pendens* was registered. In a late case (*h*) it was held that in an action by an equitable mortgagee for sale or foreclosure, the court has power, on an *ex parte* application of the plaintiff, to grant an interim injunction to restrain dealing with the legal estate on the ground that a *lis pendens* is not an adequate protection to the plaintiff.

§ 407. In general, a judgment is not constructive notice to any persons who are not parties or privies to it; and, therefore, other persons are not presumed to have notice of its contents. A judgment was made a general charge upon lands of the debtor by the Statute of Westminster 2. The right so acquired was a legal right, and with that a court of equity could not interfere (*i*). Provisions have intermittently been made for the registration of judgments and relieving purchasers from the effect of unregistered judgments. These statutes have since been repealed and according to the law now in force the writ of execution is registered, and from the date of registration of the writ of execution the land is bound, although further proceedings may be necessary to render the land available in execution (*k*).

§ 408. To constitute constructive notice, it is not indispensable that it should be brought home to the party himself. It is sufficient, if it is brought home to the agent, solicitor, or counsel of the party; for, in such cases, the law presumes notice in the principal, since it would be a breach of duty in the former not to communicate the knowledge to the latter (*l*). But, in all these cases, notice to bind the principal should be notice in the same transaction, or negotiation; for, if the agent, solicitor, or counsel was employed in the same thing by another person, or in another business or affair, and at another time, since which he may have forgotten the facts, it would be unjust to charge his present principal on account of such a defect of memory (*m*). It was significantly observed by Lord Hardwicke, that, if this rule were not adhered to, it would make the titles of purchasers and mortgagees depend altogether upon the memory of their counsellors and agents; and oblige them to apply to persons of less eminence as counsel, as being less likely to have notice of former transactions (*n*).

§ 409. The doctrine, which has been already stated, in regard to the effect of notice, is strictly applicable to every purchaser whose

(*h*) *London and County Banking Company v. Lewis*, 21 Ch. D. 401.

(*i*) See *Benham v. Keane*, 3 De G. F. & J. 318.

(*k*) *Lord Ashburton v. Nocton*, [1915] 1 Ch. 274.

(*l*) *Espin v. Pemberton*, 3 De G. & J. 547. See *Berwick & Co. v. Price*, [1905] 1 Ch. 632.

(*m*) *Fitzgerald v. Falconberg*, Fitzgib. 211. This is now so by statute; see § 400b.

(*n*) *Warrick v. Warrick*, 3 Atk. 290; *Worsley v. Earl of Scarborough*, 3 Atk. 292; *Lowther v. Carlton*, 2 Atk. 242, 292.

title comes into his hands, affected with such notice. But it in no manner affects any such title derived from another person, in whose hands it stood free from any such taint. Thus, a purchaser with notice may protect himself unless he is a trustee repurchasing trust property for his own benefit (o), by purchasing the title of another *bonâ fide* purchaser for a valuable consideration without notice; for, otherwise, such *bonâ fide* purchaser would not enjoy the full benefit of his own unexceptionable title. Indeed, he would be deprived of the marketable value of such a title; since it would be necessary to have public notoriety given to the existence of a prior incumbrance, and no buyer could be found, or none except at a depreciation equal to the value of the incumbrance. For a similar reason, if a person who has notice, sells to another who has no notice, and is a *bonâ fide* purchaser for a valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he derived it; for, otherwise, no man would be safe in any purchase, but would be liable to have his own title defeated by secret equities, of which he could have no possible means of making a discovery.

§ 410. This doctrine, in both of its branches, has been settled for nearly two centuries and a half; and it arose in a case in which A. purchased an estate, with notice of an incumbrance, and then sold it to B., who had no notice; and B. afterwards sold it to C., who had notice; and the question was, whether the incumbrance bound the estate in the hands of C. The then Master of the Rolls thought, that although the equity of the incumbrance was gone, while the estate was in the hands of B., yet it was revived upon the sale to C. But the Lord Keeper reversed the decision, and held, that the estate in the hands of C. was discharged of the incumbrance, notwithstanding the notice of A. and C. (p). This doctrine has ever since been adhered to as an indispensable muniment of title (q). And it is wholly immaterial of what nature the equity is, whether it is a lien, or an incumbrance, or a trust, or any other claim; for a *bonâ fide* purchase of an estate, for a valuable consideration, purges away the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud. But, if the estate becomes re-vested in him, the original equity will re-attach to it in his hands (r).

§ 411. Indeed, purchasers of this sort are so much favoured in

(o) *Delves v. Gray*, [1902] 2 Ch. 606; *Gordon v. Holland*, 82 L. J. P. C. 81.

(p) *Harrison v. Forth*, Prec. Ch. 61.

(q) *Sweet v. Southcote*, 2 Bro. C. C. 66; *McQueen v. Farquhar*, 11 Ves. 467; *Barrow's Case*, 14 Ch. D. 432; *Wilkes v. Spooner*, [1911] 2 K. B. 473.

(r) *Bovey v. Smith*, 1 Vern. 60, 84, 144; *Delves v. Gray*, [1902] 2 Ch. 606; *Gordon v. Holland*, 82 L. J. P. C. 81.

equity, that it may be stated to be a doctrine now generally established, that a *bonâ fide* purchaser for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any mortgage, or other incumbrance, upon the same estate for his protection. If he can defend himself by any of them at law, his adversary will have no help in equity to set these incumbrances aside; for equity will not disarm such a purchaser; but will act upon the wise policy of the common law, to protect and quiet lawful possessions, and strengthen such titles. We shall have occasion, hereafter, in various cases, to see the application of this doctrine.

§ 412. And this naturally leads us to the consideration of the equitable doctrine of tacking, as it is technically called, that is, uniting securities, given at different times, so as to prevent any intermediate purchasers from claiming a title to redeem, or otherwise to discharge one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title (*s*). Thus, if a third mortgagee, without notice of a second mortgage, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee would not be permitted to redeem the first mortgage without redeeming the third mortgage also; for, in such a case, equity tacks both mortgages together in his favour. And, in such a case, it will make no difference that the third mortgagee, at the time of purchasing the first mortgage, had notice of the second mortgage; for he is still entitled to the same protection (*t*).

§ 413. There is, certainly, great apparent hardship in this rule; for it seems most conformable to natural justice, that each mortgagee should, in such a case, be paid according to the order and priority of his incumbrances, and this is the rule where the legal estate is outstanding (*u*). The general reasoning, by which this doctrine is maintained, is this: *In æquali jure, melior est conditio possidentis*. Where the equity is equal, the law shall prevail; and he that hath only a title in equity shall not prevail against a title by law and equity in another. But, however correct this reasoning may be when rightly applied, its applicability to the case stated may reasonably be doubted. It is assuming the whole case, to say that the right is equal, and the equity is equal. The second mortgagee has a prior right, and at least an equal equity; and then the rule seems justly to apply, that, where the equities are equal, that title which is prior in time shall prevail; *Qui prior est in tempore, potior est in jure* (*x*).

(*s*) *Marsh v. Lee*, 2 Vent. 337; *Lacey v. Ingle*, 2 Ph. 413; *Spencer v. Pearson*, 24 Beav. 266. See *Bailey v. Barnes*, [1894] 1 Ch. 25.

(*t*) *Marsh v. Lee*, 2 Vent. 337.

(*u*) *Frere v. Moore*, 8 Pri. 475; *London & County Bank v. Goddard*, [1897] 1 Ch. 642; *Taylor v. London & County Bank*, [1901] 2 Ch. 231.

(*x*) The doctrine of tacking was abolished by the Vendor and Purchaser Act, 1874, but was restored by the Land Transfer Act, 1875.

§ 414. It has been significantly said, that it is a plank, gained by the third mortgagee, in a shipwreck, *tabula in naufragio* (y). But, independently of the inapplicability of the figure, which can justly apply only to cases of extreme hazard to life, and not to mere seizures of property, it is obvious, that no man can have a right, in consequence of a shipwreck, to convert another man's property to his own use, or to acquire an exclusive right against a prior owner. The best apology for the actual enforcement of the rule is, that it has been long established, and that it ought not now to be departed from, since it has become a rule of property.

§ 415. Lord Hardwicke has given the following account of the origin and foundation of the doctrine. "As to the equity of this court, that a third incumbrancer, having taken his security or mortgage without notice of the second incumbrance, and then, being puisne, taking in the first incumbrance, shall squeeze out and have satisfaction before the second; that equity is certainly established in general; and was so in *Marsh v. Lee*, by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio*. This is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since; and, I believe, was rightly settled only on this foundation by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates. And, therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still, they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity on one side, this court never thought fit, that, by reason of a prior equity against a man, who had a legal title, that man should be hurt; and this, by reason of that force, this court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule, *Qui prior est in tempore, potior est in jure*, must hold" (z).

§ 416. Indeed, so little has this doctrine of tacking to commend itself, that it has stopped far short of the analogies, which would seem to justify its application (a); and it has been confined to cases where the party, in whose favour it is allowed, originally *bonâ fide* advanced his money on the security of the land. Thus, if a puisne creditor, by judgment, should buy in a prior mortgage, he would not be allowed to tack his judgment to such a mortgage, so as to cut out a mesne mortgagee (b). The reason is said to be, that a creditor can

(y) *Marsh v. Lee*, 2 Vent. 337.

(z) *Wortley v. Birkhead*, 2 Ves. Sen. 573.

(a) See *Thornycroft v. Crockett*, 2 H. L. C. 239.

(b) *Brace v. Duchess of Marlborough*, 2 P. Will. 492 to 495; *Ex parte Knott*,

in no just sense be called a purchaser; for he does not advance his money upon the immediate credit of the land; and, by his judgment, he does not acquire any right in the land. He has neither *jus in re*, nor *jus ad rem*; but a mere lien upon the land, which may, or may not, afterwards be enforced upon it (c). But if, instead of being a judgment creditor, he were a third mortgagee, and should then purchase in a prior judgment, in such case he would be entitled to tack both together. The reason for the diversity is, that in the latter case he did originally lend his money upon the credit of the land; but in the former he did not, but was only a general creditor, trusting to the general assets of his debtor (d).

§ 417. Further advances may be tacked as against a puisne incumbrance of whose security the legal mortgagee has no notice (e), as he might in respect of sums due upon a statute or judgment upon the presumption that he lent the further sum upon the statute or judgment upon the same security, although it passed no present interest in the land, but gave a lien only (f).

§ 418. And yet, such a prior mortgagee, having a bond debt, has never been permitted to tack it against any intervening incumbrancers of a superior nature between his bond and mortgage; nor against other specialty creditors; nor even against the mortgagor himself; nor against a surety; but only against his heir, to avoid circuitry of action (g). The reason given is, that the bond debt, except as against the heir, is not a charge on the land. And tacking takes place only when the party holds both securities in the same right. For if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he will not be allowed to tack two mortgages together, to the prejudice of intervening incumbrancers (h).

§ 419. It cannot be denied, that some of these distinctions are extremely thin, and stand upon very artificial and unsatisfactory reasoning. The account of the matter given by Lord Hardwicke (i), is probably the true one. But it is a little difficult to perceive how the foundation could support such a superstructure, or rather, why the

11 Ves. 609; *Lacey v. Ingle*, 2 Ph. 413. See *Mayor of Brecon v. Seymour*, 26 Beav. 548.

(c) *Averall v. Wade*, Ld. & G. 252; *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507.

(d) *Higgin v. Lyddal*, 1 Ch. Cas. 149; *Mackreth v. Symmons*, 15 Ves. 354.

(e) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Wyllie v. Pollen*, 3 De G. J. & S. 596; *Hopkinson v. Rolt*, 9 H. L. C. 514; *West v. Williams*, [1899] 1 Ch. 132.

(f) *Shepherd v. Titley*, 2 Atk. 352; *Ex parte Knott*, 11 Ves. 617; *Lacey v. Ingle*, 2 Ph. 413.

(g) *Lowthian v. Hasel*, 3 Bro. C. C. 163; *Morret v. Paske*, 2 Atk. 51; *Price v. Fastnedge*, Ambler 685, and Mr. Blunt's note; *Jones v. Smith*, 2 Ves. Jun. 376; *Adams v. Claxton*, 6 Ves. 229; *Forbes v. Jackson*, 19 Ch. D. 615. See *Thomas v. Thomas*, 22 Beav. 341; *Talbot v. Frere*, 9 Ch. D. 568.

(h) *Morret v. Paske*, 2 Atk. 53.

(i) *Wortley v. Birkhead*, 2 Ves. Sen. 574; *ante*, § 415.

intelligible equity of the case, upon the principles of natural justice, should not be rigorously applied to it. Courts of equity have found no difficulty in applying it, where the puisne incumbrancer has bought in a prior equitable incumbrance; for in such cases they have declared, that where the puisne incumbrancer has not obtained the legal title; or where the legal title is vested in a trustee; or where he takes *in autre droit*; the incumbrances shall be paid in the order of their priority in point of time, according to the maxim above mentioned (*k*). The reasonable principle is here adopted, that he who has the better right to call for the legal title, or for its protection, shall prevail.

§ 420. The civil law has proceeded upon a far more intelligible and just doctrine on this subject. It wholly repudiates the doctrine of tacking; and gives the fullest effect to the maxim, *Qui prior est in tempore, potior est in jure*, excluding it only in cases of fraud, or of consent, or of a superior equity (*l*).

§ 421. But, whatever may be thought as to the foundation of the doctrine of tacking in courts of equity, it is now firmly established. It is, however, to be taken with this most important qualification, that the party who seeks to avail himself of it is a *bonâ fide* purchaser, without notice of the prior or intermediate incumbrance, at the time when he took his security; for if he then had such notice, he has not the slightest claim to the protection or assistance of a court of equity; and he will not be allowed to tack the amount of his subsequent advance, or by purchasing a prior incumbrance, to tack his own tainted mortgage or other title to the latter (*m*).

§ 422. Another instance of the application of this wholesome doctrine of constructive fraud, arising from notice, may be seen in the dealings with executors and other persons, holding a fiduciary character, and third persons colluding with them in violation of their trust. Thus, purchases from executors of the personal property of their testator are ordinarily obligatory and valid notwithstanding they may be affected with some peculiar trusts or equities in the hands of the executors. For the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, for which they are legally bound, before all other claims. But, if the purchaser knows or must be deemed to have known that the executor is wasting and turning the testator's estate into money, the more easily to run away with it, or for any other unlawful purpose, he will be deemed *particeps criminis*, and his purchase set aside as fraudulent (*n*).

(*k*) *Barnett v. Weston*, 12 Ves. 130; *Frere v. Moore*, 8 Pri. 475; *London & County Bank v. Goddard*, [1897] 1 Ch. 642; *Taylor v. London & County Bank*, [1901] 2 Ch. 231.

(*l*) See Dig. Lib. 20, tit. 4, f. 16.

(*m*) *Brace v. Duchess of Marlborough*, 2 P. Will. 491, 495; *Hopkinson v. Rolt*, 9 H. L. C. 574; *West v. Williams*, [1899] 1 Ch. 132.

(*n*) *Hill v. Simpson*, 7 Ves. 152; *McLeod v. Drummond*, 14 Ves. 359; 17 Ves. 153; *Walker v. Taylor*, 8 Jur. N. S. 681.

§ 423. The reason for this diversity of doctrine has been fully stated by Sir William Grant. "It is true" (said he) "that executors are, in equity, mere trustees for the performance of the will; yet in many respects, and for many purposes, third persons are entitled to consider them absolute owners. The mere circumstance that they are executors will not vitiate any transaction with them; for the power of disposition is generally incident, being frequently necessary. And a stranger shall not be put to examine whether, in the particular instance, that power has been discreetly exercised. But, from that proposition, that a third person is not bound to look to the trust in every respect, and for every purpose, it does not follow that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee, when he knows the executor is applying the assets to a purpose wholly foreign to his trust. No decision necessarily leads to such a consequence" (o). The same doctrine is applied to the cases of executors or administrators colluding with the debtors to the estate, either to retain or to waste the assets; for, in such cases, the creditors will be allowed to sue the debtors directly in equity, making the executor or administrator also a party to the action, although, ordinarily, the executor or administrator only can sue for the debts due to the deceased (p). Indeed, the doctrine may be even more generally stated; that he who has voluntarily concurred in the commission of a fraud by another, shall never be permitted to obtain a profit thereby against those who have been thus defrauded.

§ 424. It seems at one time to have been thought, that no person but a creditor, or a specific legatee of the property, could question the validity of a disposition made of assets by an executor, however fraudulent it might be. But that doctrine is so repugnant to true principles, that it could scarcely be maintained whenever it came to be thoroughly sifted (q). It is now well understood that pecuniary and residuary legatees may question the validity of such a disposition; and, indeed, residuary legatees stand upon a stronger ground than pecuniary legatees generally; for, in a sense, they have a lien on the fund, and may go into equity to enforce it upon the fund (r).

§ 425. The author then proceeded to consider under the present head of constructive fraud, voluntary conveyances of freehold lands (s), in regard to subsequent purchasers. This class was founded, in a great measure, if not altogether, upon the provisions of the statute of

(o) *Hill v. Simpson*, 7 Ves. 166.

(p) *Burroughs v. Elton*, 11 Ves. 29; *Holland v. Prior*, 1 Myl. & K. 237; *Travis v. Milne*, 9 Hare 141; *Yeatman v. Yeatman*, 7 Ch. D. 210.

(q) *Mead v. Lord Orrery*, 3 Atk. 235.

(r) *Hill v. Simpson*, 7 Ves. 152; *McLeod v. Drummond*, 14 Ves. 359; s.c. 17 Ves. 169.

(s) *Price v. Jenkins*, 5 Ch. D. 619.

27 Eliz. c. 4, which did not apply to personal estate (*t*). The object of that statute was, to give full protection to subsequent purchasers from the grantor, against mere volunteers, under prior conveyances. As between the parties themselves, such conveyances are positively binding, and cannot be disturbed; for the statute does not reach such cases (*u*).

§ 426. It was for a long period of time a much litigated question whether the effect of the statute was to avoid all voluntary conveyances (that is, all such as were made merely in consideration of natural love or affection, or were mere gifts), although made *bonâ fide*, in favour of all subsequent purchasers, with or without notice; or whether it applied only to conveyances made with a fraudulent intent, and to purchasers without notice. After no inconsiderable diversity of judicial opinion, the doctrine was at length established (whether in conformity to the language or intent of the statute is exceedingly questionable), that all such conveyances were void as to subsequent purchasers, whether they were purchasers with or without notice, although the original conveyance was *bonâ fide*, and without the slightest admixture of intentional fraud; upon the ground that the statute in every such case infers fraud, and will not suffer the presumption to be gainsaid (*x*). The doctrine, however, was admitted to be full of difficulties; and it was accepted rather upon the pressure of authorities, and the vast extent to which titles had been acquired and held under it, than upon any notion that it had a firm foundation in reason and a just construction of the statute. The rule *stare decisis*, was here applied to give repose and security to titles fairly acquired, upon the faith of judicial decisions (*y*). Eventually the legislature intervened, and by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), voluntary conveyances of freehold lands cannot be defeated by a subsequent sale for value unless fraudulent in fact in their inception.

§ 435. The civil law proceeded upon the same enlightened policy. In the case of alienations of movables, and immovables, *bonâ fide* purchasers for a valuable consideration, having no knowledge of any fraudulent intent of the grantor or debtor, were protected. “*Ait prætor; Quæ fraudationis causa gesta erunt, cum eo, qui fraudem non ignoraverit, actionem dabo*” (*z*). Upon this, there follows this comment. “*Hoc Edictum eum coërcet, qui sciens eum in fraudem creditorum hoc facere, suscepit, quod in fraudem creditorum fiebat. Quare, si quid in fraudem creditorum factum sit, si tamen is, qui cepit, ignoravit, cessare videntur verba Edicti*” (*a*). And the very case is

(*t*) *Jones v. Croucher*, 1 Sim. & St. 315.

(*u*) *Smith v. Garland*, 1 Mer. 123; *Johnson v. Legard*, T. & R. 281.

(*x*) *Doe v. Manning*, 9 East 58.

(*y*) *Trowell v. Shenton*, 8 Ch. D. 318; *Godfrey v. Poole*, 13 App. Cas. 497.

(*z*) Dig. Lib. 42, tit. 8, f. 1.

(*a*) Ibid. f. 6, § 8.

afterwards put, of a *bonâ fide* purchaser from a fraudulent grantee, the validity of whose purchase is unequivocally affirmed. “Is, qui a debitore, cujus bona possessa sunt, sciens rem emit, iterum alii bonâ fide ementi vendidit; quæsitum sit, an secundus emptor conveneri potest? Sed verior est Sabini sententia, bonâ fide emptorem non teneri; quia dolus ei duntaxat nocere debeat, qui eum admisit; quemadmodum diximus, non teneri eum, si ab ipso debitore ignorans emerit. Is autem, qui dolo malo emit, bonâ fide autem ementi vendidit, in solidum pretium rei, quod accepit, tenebitur” (b). The same doctrine is fully recognized by Voet (c). And its intrinsic justice is so persuasive and satisfactory, that whether derived from Roman sources or not, it would have been truly surprising not to have found it embodied in the jurisprudence of England.

§ 436. Indeed, the principle is more broad and comprehensive; and, although not absolutely universal (for there are anomalies in the case of judgment creditors, and the case of dower) (d); yet it is generally true, and applies to cases of every sort, where an equity is sought to be enforced against a *bonâ fide* purchaser of the legal estate without notice, or even against a *bonâ fide* purchaser, not having the legal estate, where he has a better right or title to call for the legal estate than the other party. It applies, therefore, to cases of accident and mistake, as well as to cases of fraud, which, however remediable between the original parties, are not relievable, as against such purchasers, under such circumstances.

§ 439. We have thus gone over the principal grounds upon which courts of equity grant relief in cases of accident, mistake, and fraud. And here the flexibility of courts of equity in adapting their judgments to the actual relief required by the parties is strikingly illustrated. Accident, mistake, and fraud are of an infinite variety in form, character, and circumstances, and are incapable of being adjusted by any single and uniform rule. Of each of them one might say, “Mille trahit varios adverso sole colores.” The beautiful character, pervading excellence, if one may say, of equity jurisprudence is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case in all its complex habitudes. Thus, to present a summary of what has been already stated, if conveyances or other instruments are fraudulently or improperly obtained, they are decreed to be given up and cancelled. If they are money securities, on which the money has been paid, the money is decreed to be paid back. If they are deeds, or other muniments of title, detained from the rightful party, they are decreed to be delivered up. If they are deeds suppressed or spoliated, the party is decreed to hold the same

(b) Dig. Lib. 42, tit. 8, f. 9.

(c) 2 Voet, Comm. Lib. 42, tit. 8, § 10, p. 105.

(d) See *ante*, § 108, 381, 410; *post*, § 630.

rights as if they were in his possession and power. If there has been any undue concealment, or misrepresentation, or specific promise collusively broken, the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith. If the party says nothing, but by his expressive silence misleads another to his injury, he is compellable to make good the loss; and his own title, if the case requires it, is made subservient to that of the confiding purchaser. If a party, by fraud or misrepresentation, induces another to do an act injurious to a third person, he is made responsible for it. If, by fraud or misrepresentation, he prevents acts from being done, equity treats the case, as to him, as if it were done; and makes him a trustee for the other. If a will is revoked by a fraudulent deed, the revocation is treated as a nullity. If a devisee obtains a devise by fraud, he is treated as a trustee of the injured parties. In all these, and many other cases which might be mentioned, courts of equity undo what has been done, if wrong; and do what has been left undone, if right.

§ 440. We may conclude this head, by calling the attention of the reader to the remark (which has been necessarily introduced in another place), that courts of equity will exercise a concurrent jurisdiction with courts of law in all matters of fraud, excepting only of fraud in obtaining a will, which, if of real estate, was consistently referred to a court of law to decide it, and which, if of personal estate, was cognizable in the Court of Probate. But, even in this case, the bill might be retained, to abide the decision in the proper court, and relief be decreed according to the event. No other excepted case is known to exist; and it is not easy to discern the grounds upon which this exception stands, in point of reason or principle, although it is clearly settled by authority. But where the fraud did not go to the whole will, but only to some particular clause; or where the fraud was in unduly obtaining the consent of the next of kin to the probate, courts of equity laid hold of these circumstances to declare the executor a trustee for the next of kin (*e*).

(*e*) *Allen v. McPherson*, 1 H. L. C. 191; *Meluish v. Milton*, 3 Ch. D. 27; *Priestman v. Thomas*, 9 P. D. 210.

CHAPTER VIII.

ACCOUNT.

§ 441. HAVING disposed of these three great heads of concurrent equitable jurisdiction in matters of accident, mistake, and fraud, the undisputed possession of which has belonged to courts of equity from the earliest period which can be traced out in our judicial annals, we may now pass to others of a different and less extensive character. We allude to the heads, where the jurisdiction, although it may attach upon any or all of the grounds above mentioned, is not necessarily dependent upon them, and, in fact, is exercised in a variety of cases where they do not apply, upon another distinct ground, namely, that the subject-matter is, *per se*, within the scope of equitable jurisdiction. Among these are matters of account, and, as incident thereto, matters of apportionment, contribution, and average; liens, rents, and profits; waste; matters of administration, legacies, and marshalling of assets; confusion of boundaries; matters of dower; marshalling of securities; matters of partition; matters of partnership; and, lastly, matters of rent, so far as they are not embraced in the preceding head of Account.

§ 442. Let us begin with matters of ACCOUNT. One of the most ancient forms of action at the common law is the action of account. But the modes of proceeding in that action, although aided from time to time by statutable provisions, were found so very dilatory, inconvenient, and unsatisfactory, that as soon as courts of equity began to assume jurisdiction in matters of account, as they did at a very early period, the remedy at law began to decline; and, although some efforts were made in subsequent times to resuscitate it in England, it fell into almost total disuse (a). Courts of equity for a long time exercised a general jurisdiction in all cases of mutual accounts, upon the ground of the inadequacy of the remedy at law; and extended the remedy to a vast variety of cases (such as to implied and constructive trusts) to which the remedy at law never was applied (b). The jurisdiction extended, not only to cases of an equit-

(a) See *Att.-Gen. v. Dublin Corporation*, 3 Bli. N. S. 314. In *Godfrey v. Saunders*, 3 Wils. 73, 113, 117, which is one of the few modern actions of account in England, Lord Chief Justice Wilmot said (p. 117), "I am glad to see this action of account is revived in this court." But the parliamentary commissioners, in their second report on the common law, 8th March, 1830 (pp. 9, 25, 26), had no scruple to admit its inconvenience and dilatoriness, and that it had gone into disuse.

(b) See *Corporation of Carlisle v. Wilson*, 13 Ves. 275.

able nature, but to many cases where the form of the account was purely legal, and the items, constituting the account, were founded on obligations purely legal.

§ 443. The difficulties in the modes of proceeding in common law actions of account, and the convenience of the modes of proceeding in suits in equity, to attain the ends of substantial justice, are stated in an elementary work of solid reputation, with great clearness and force. The language of one learned author is as follows: "The proceedings in this action being difficult, dilatory, and expensive, it is now seldom used, especially if the party have other remedy, as debt, covenant, case, or if the demand be of consequence, and the matter of an intricate nature; for, in such a case, it is more advisable to resort to a court of equity, where matters of account are more commodiously adjusted, and determined more advantageously for both parties; the plaintiff being entitled to a discovery of books, papers, and the defendant's oath; and, on the other hand, the defendant being allowed to discount the sums paid or expended by him; to discharge himself of sums under forty shillings by his own oath; and if by answer or other writing he charges himself, by the same to discharge himself, which will be good, if there be no other evidence. Further, all reasonable allowances are made to him; and if after the account is stated, anything be due to him upon the balance, he is entitled to a decree in his favour" (c).

§ 444. To expound and justify the truth of these remarks, it may be well to take a short review of the old action of account, and to see to what narrow boundaries it was confined, and by what embarrassments it was surrounded.

§ 445. At the common law, an action of account lay only in cases where there was either a privity in deed, by the consent of the party, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against a guardian in socage (d). An exception, indeed, or rather an extension of the rule, was, for the benefit of trade and the advancement of commerce, allowed in favour of and between merchants; and therefore, by the law-merchant, one naming himself a merchant might have an account against another, naming him a merchant, and charge him as receiver (e). But, in truth, in almost every supposable case of this sort, there was an established privity of contract. With this exception, however (if such it be), the action was strictly confined to bailiffs, receivers, and guardians, in socage (f). So strictly was this privity of contract construed, that

(c) *Bac. Abr. Accountt.* See, also, *Att.-Gen. v. Dublin Corporation*, 3 Bli. N. S. 312.

(d) 1 Co. Litt. 90 b; *ibid.* 172 a; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note; *Bac. Abr. Accountt.* A.; *Com. Dig. Accountt.* A. 1; 2 Inst. 379.

(e) Co. Litt. 172 a; *Earl of Devonshire's case*, 11 Co. 89.

(f) Buller, N. P. 127; 1 Eq. Abr. 5, note (a); 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (n); Co. Litt. 172 a; 2 Inst. 379.

the action did not lie by or against executors and administrators. The statute of 13 Edw. 3, c. 23, gave it to the executors of a merchant; the statute of 25 Edw. 3, c. 5, gave it to the executors of executors; and the statute of 31 Edw. 3, c. 11, to administrators (*g*). But it was not until the statute of 3 & 4 Anne, c. 16, that it lay against executors and administrators of guardians, bailiffs, and receivers (*h*).

§ 446. But in all cases of this latter sort, although there was no remedy at the common law, yet a bill in equity might be maintained for an account against the personal representatives of guardians, bailiffs, and receivers; and such was the usual remedy prior to the remedial statute of Anne (*i*). And no action of account lay at the common law against wrongdoers (*k*); or by one joint-tenant, or tenant in common, or his executors or administrators, against the other, as bailiff, for receiving more than his share; or against his executors or administrators, unless there was some special contract between them, whereby the one made the other his bailiff; for the relation itself was held not to create any privity of contract by operation of law (*l*). This defect was afterwards cured by the statute of the 3 & 4 Anne, c. 16 (*m*). The common law was strict, as to who was to be accounted a bailiff or receiver; for a bailiff was understood to be one who had the administration and charge of lands, goods, and chattels, to make the best benefit for the owner, and against whom, therefore, an action of account lie for the profits, which he had made, or might, by his industry or care, have reasonably made: his reasonable charges and expenses being deducted (*n*). A receiver was one who received money to the use of another to render an account; but upon his account he was not allowed his expenses and charges, except in the case of merchant receivers. And this exception was provided (as it was said) by the law of the land in favour of merchants, and for the advancement of trade and traffic (*o*). So that it will be at once perceived from these cases (and many others might be mentioned (*p*)) that the remedy at the common law was very narrow; and although it was afterwards enlarged, that would not of itself displace the jurisdiction originally vested in courts of equity.

(*g*) Co. Litt. 90 b.

(*h*) *Ibid.*; *Buller*, N. P. 127; *Earl of Devonshire's Case*, 11 Co. 89.

(*i*) 1 Eq. Cas. Abr. 5, note (*a*).

(*k*) *Bac. Abr. Accompt*, B. We shall presently see that courts of equity frequently administer relief in cases of account against wrongdoers. See *Bac. Abr. Accompt*, B.; *Bosanquet v. Dashwood*, Cas. temp. Talb. 38, 41.

(*l*) Co. Litt. 172, and Harg. note (8); Co. Litt. 186 a, 119 b, and Harg. note (83); *Wheeler v. Horne*, Willes 208; *Bac. Abr. Accompt*, A.; 1 Saund. 216, Williams's note.

(*m*) 3 Black. Comm. 364.

(*n*) Co. Litt. 172.

(*o*) *Ibid.* 172 a.

(*p*) See *Bac. Abr. Accompt*, B., C.; *Com. Dig. Accompt*, A., B., D.; 3 Reeves 337, 338, 339; 3 Reeves 337; 3 Reeves 75, 76; 4 Reeves 388.

§ 446a. In the next place, as to the modes of proceeding in actions of account. At the common law, before either the statute of Marlebridge, c. 23, or of Westminster 2nd, c. 11, there were two methods of proceeding against an accountant; one, by which the party, to whom he was accountable, might, by consent of the accountant, either take the account himself, or assign an auditor or auditors to take it; and then have his action of debt for the arrearages; or, in more modern times, an action on the case, or *insimul computassent*. And the accountant, if aggrieved, might have his writ of *ex parte talis*, to re-examine the account in the exchequer. The other proceeding of the plaintiff was, in the first instance, by way of a writ of account. The process, by which this latter remedy might be made more effectual, is particularly described in the statute of Marlebridge, and the statute of Westminster 2nd, upon which it is unnecessary to dwell (*q*).

§ 447. In the action of account, there were two distinct courses of proceeding. In the first place, the party might interpose any matter in abatement or bar of the proceeding; and if he failed in it, then there was an interlocutory judgment, that he should account (*quod computet*) before auditors (*r*). After this judgment was entered, it was the duty of the court to assign auditors, who were armed with authority to convene the parties before them, *de die in diem*, at any time or place they should appoint until the accounting was determined. The time by which the account was to be settled was prefixed by the court. But, if the account were of a long or confused nature, the court would, upon the application of the parties, enlarge the time. In taking the account, the auditors in an action of account at the common law could not administer an oath, except in one or two particular cases. But, under the statute of 3 & 4 Anne, c. 16, the auditors were empowered to administer an oath, and examine the parties touching the matters in question, in cases within that Act (*s*).

§ 448. If, in the progress of the cause before the auditors, when the items were successively brought under review, any controversy should arise before the auditors, as to charging or discharging any items, the parties had a right, if the points involved matters of fact, to make up and join issues upon such items respectively; and, if the points involved matters in law, they had a right in like manner to put in and join demurrers upon each distinct item. These issues, when so made up, were to be certified, by the auditors, to the court; and then the matters of law were decided by the court; and the matters of fact were tried by a jury, after which the accounts were settled by the auditors according to the results of these trials. From this circumstance the proceedings before the auditors were often

(*q*) Com. Dig. *Accompt*, A., and note (*a*); 3 Reeves 75, 76.

(*r*) 3 Black. Comm. 164; *O'Connor v. Spaight*, 1 Sch. & Lefr. 309.

(*s*) Co. Litt. 199, and Harg. note (83); *Wheeler v. Horne*, Willes 208, 210; 1 Selwyn, N. P. 6; Buller, N. P. 127; Bac Abr. *Wager of Law*, C.

tedious, expensive, and inconvenient (t). And, indeed, as different points both of fact and law might arise in different stages of the suit and in different examinations before the auditors, as well after as before such issues had been joined and tried, it ought not to be surprising, that the cause should be procrastinated for a great length of time, by its transition from one tribunal to another, for the various purposes incident to a due settlement of its merits. And besides these difficulties, there were many actions of account in which the defendant might wage his law, and thus escape from answering his adversary's claim (u).

§ 449. This summary view of the modes of proceeding in the action of account is sufficient to show, that it was a very unfit instrument to ascertain and adjust the real merits of long, complicated, and cross accounts. In the first place, it was inapplicable to a vast variety of cases of equitable claims, of constructive trusts, of fraudulent contrivances and of tortious misconduct. In the next place, there was a want of due power to draw out the proper proofs from the party's own conscience; so that if evidence *aliunde* was unattainable, there was, and there could be, no effective redress. And it has been well observed by Mr. Justice Blackstone, that, notwithstanding all the legislative provisions in aid of the common-law action of account, "it is found by experience, that the most ready and effectual way to settle these matters of account is by a bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce" (x).

§ 450. Courts of equity, in suits of this nature, proceed, in many respects, in analogy to what is done at law. The cause is referred to a master (acting as an auditor), before whom an account is taken, and he is armed with the fullest powers, not only to examine the parties on oath, but to make all the inquiries by testimony under oath, and by documents and books and vouchers, to be produced by the parties, which are necessary for the due administration of justice. And when his report is made to the court, any objections which have been made before the master, and any exceptions taken to his report, may be re-examined by the court at the instance of the parties, and the whole case is moulded as, *ex æquo et bono*, may be required (y). The court may, besides, bring all the proper parties in interest before it, where there are different parties concerned in interest; and, if any doubt arises upon any particular demand, it may direct the same to be ascertained by an issue and verdict at law. So that there cannot be

(t) *Ex parte Bax*, 2 Ves. 388; Bac. Abr. *Accompt*, F.; Buller, N. P. 127, 128; Yelverton, 202, Metcalf's note (1).

(u) Com. Dig. *Pleader*, 2 W. 45; Co. Litt. 90 b; *ibid.* 295 b; *Archer's case*, Cro. Eliz. 579; Bac. Abr. *Wager of Law*, D., G.

(x) 3 Black. Comm. 164.

(y) *Ex parte Bax*, 2 Ves. 388.

any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law (z).

§ 451. This has, accordingly, been considered in modern times as the true foundation of the jurisdiction. Mr. Justice Blackstone has, indeed, placed it upon the sole ground of the right of the courts of equity to compel a discovery—"For want" (said he) "of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in matters of account" (a). But this, although a strong, yet is not the sole ground of the jurisdiction. The whole machinery of courts of equity is better adapted to the purpose of an account in general; and in many cases, independent of the searching power of discovery, and supposing a court of law to possess it, it would be impossible for the latter to do entire justice between the parties; for equitable rights and claims, not cognizable at law, are often involved in the contest. Lord Redesdale has justly said that, in a complicated account, a court of law would be incompetent to examine it at *Nisi Prius* with all the necessary accuracy (c). This is the principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account, that it cannot be properly taken at law; and until the result of the account is known, the justice of the case cannot appear (d). Matters of account (he had added) may, indeed, be made the subject of an action; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of account shows it. The only judgment was, that the party should account, and then the account was taken by the auditors. The court never went into it (e).

§ 452. It is not improbable that, originally, in cases of account, which might be cognizable at law, courts of equity interfered upon the special ground of accident, mistake, or fraud. If so, the ground was very soon enlarged, and embraced mixed cases not governed by these matters. The courts soon arrived at the conclusion that the true principle upon which they should entertain suits for an account in matters cognizable at law was, that either a court of law could not give any remedy at all, or not so complete a remedy as courts of equity. And the moment this principle was adopted in its just extent, the concurrent jurisdiction became almost universal, and reached almost instantaneously its present boundaries (f).

(z) *Corporation of Carlisle v. Wilson*, 13 Ves. 278, 279.

(a) 3 Black. Comm. 437.

(c) *O'Connor v. Spaight*, 1 Sch. & Lefr. 930. See *White v. Williams*, 8 Ves. 193.

(d) *O'Connor v. Spaight*, 1 Sch. & Lefr. 309; *Harrington v. Churchward*, 29 L. J. Ch. 521.

(e) *Cooper*, Eq. Pl. 134.

(f) *Corporation of Carlisle v. Wilson*, 13 Ves. 278.

§ 453. In virtue of this general jurisdiction in matters of account, courts of equity exercise a very ample authority over matters apparently not very closely connected with it, but which naturally, if not necessarily, attach to such a jurisdiction. Mr. Justice Blackstone has said: "As incident to accounts, they take a concurrent cognizance of the administration of personal assets; consequently, of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes and all questions relating thereto; of all dealings in partnership and many other mercantile transactions; and so of bailiffs, factors, and receivers. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts" (g). But it is far from being admitted that the sole origin of equity jurisdiction on these subjects arises from this source. It is one, but not the sole source. In many of these cases, as well as in others, which will hereafter be considered, in which accounts may be taken as incidents to the relief granted, there are other distinct, if not independent, sources of jurisdiction; and especially one source, which is the peculiar attribute of courts of equity, the jurisdiction over trusts, not merely express, but implied and constructive.

§ 458. Courts of equity also entertained jurisdiction in matters of account, not only when there were mutual accounts, but also when the accounts to be examined were on one side only, and a discovery was wanted in aid of the account, and was obtained. But where there were no mutual demands but a single matter on one side, and no discovery was required, a court of equity would not entertain jurisdiction of the suit, although there might be payments on the other side, which might be set off; for in such a case, there was not only a complete remedy at law, but there was nothing requiring the peculiar aid of equity, to ascertain or adjust the claim (h). To found the jurisdiction, in cases of a claim of this sort, there should be a series of transactions on one side, and of payments on the other.

§ 459. So that, on the whole, it may be laid down as a general doctrine, that in matters of account, growing out of privity of contract, courts of equity had a general jurisdiction where there were mutual accounts (and *à fortiori*, where the accounts were complicated), and also where the accounts were on one side, but a discovery was sought, and was material to the relief. And, on the other hand, where the accounts were all on one side, and discovery was not sought, or if sought was not required; and also, where there was a single matter on the side of the plaintiff seeking relief, and mere sets off on the other

(g) 3 Black. Comm. 437.

(h) *Hoare v. Cotencin*, 1 Bro. C. C. 27; *Mackenzie v. Johnston*, 4 Mad. 374; *Massey v. Banner*, 4 Mad. 413; *Frietas v. Don Santos*, 1 Y. & J. 574; *Blyth v. Whiffin*, 27 L. T. 330.

side, and no discovery was sought or required; in all such cases courts of equity would decline taking jurisdiction of the cause. The reason being that if no peculiar remedial process or functions of a court of equity was required, the claim would become a bare money claim and the court would merely administer the same functions in the same way as a court of law would in the suit. In short, it would act as a court of law (i).

§ 459a. So far as England is concerned the preceding discussion has become of academical interest. By force of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, legal and equitable rights are concurrently administered in all actions, but by force of section 34, sub-section 3 of the same statute matters of account are allocated to the Chancery Division, which alone has the proper administrative machinery. Actions for an account involving the taking of an account may come before the King's Bench Division, and in that event the provisions of section 14 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), enable the judge to refer cases, if the question in dispute consists wholly or in part of matters of account, to a "special referee or arbitrator" or to an "official referee or officer of the court."

§ 459b. By the Rules of the Supreme Court, 1883, Order XV. r. 1, where a writ of summons has been indorsed for an account under Order III. r. 8, of the same Rules, or where the indorsement involves taking an account, if the defendant either fails to appear, or does not, after appearance by affidavit or otherwise, satisfy the court or a judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions, now usual in the Chancery Division in similar cases, shall be forthwith made.

§ 459c. APPROPRIATION. In matters of account where several debts are due by the debtor to the creditor, it often becomes material to ascertain to what debt a particular payment made by the debtor is to be applied. This is called in our law the appropriation of payments. It is called in the foreign law the imputation of payments (k), a phrase apparently borrowed from the Roman law, where the doctrine of the appropriation of payments is carefully examined, and the leading distinctions applicable to it amply discussed (l). The doctrine may, of course, find a place wherever there exist separate and independent debts between the parties; but it is chiefly in cases of running accounts between debtor and creditor, where various payments have been made and various credits have been given at different times, that its application is felt in its full force and importance, especially where the dealings have been with a firm, as, for example, with bankers, and one

(i) *Hoare v. Cotencin*, 1 Bro. C. C. 27; *MacKenzie v. Johnston*, 4 Mad. 374; *Massey v. Banner*, 4 Mad. 413; *Frietas v. Don Santos*, 1 Y. & J. 574; *Blyth v. Whiffin*, 27 L. T. 330.

(k) Pothier on Oblig. by Evans, n. 528 (ibid. n. 561, Fr. edit. 1824).

(l) Pothier, Pand. Lib. 46, tit. 3, n. 89 to 103.

or more of the partners have deceased, and the customer still continues his dealings with the new firm, or the survivors of the old firm, and moneys have been paid in, and drawn out, from time to time (*m*). The same question often occurs, in cases of public officers, where sureties have given different bonds, at different times, for the faithful performance of the official duties, in respect of moneys received by them at different periods, embracing one or more of the bonds. How, in such cases, where running accounts are kept of debts and payments, of credits and receipts, are the payments, made at different times, before and after the change of the firm, or the change of sureties, to be appropriated? In the first place, in the case of running accounts between parties, where there are various items of debt on one side, and various items of credit on the other side, occurring at different times, and no special appropriation of the payments is made by either party, the successive payments or credits are to be applied to the discharge of the items of debit, antecedently due, in the order of time in which they stand in the accounts; or, in other words, each item of payment or credit is applied in extinguishment of the earliest items of debt standing in the account, until the whole payment or credit is exhausted (*n*). In the next place, where there are no running accounts between the parties, and the debtor himself makes no special appropriation of any payment, there the creditor is generally at liberty to apply that payment to any one or more of the debts which the debtor owes him, whether it be upon an account or otherwise (*o*).

§ 459d. The Roman law proceeded, in a great measure, if not altogether, upon similar principles. But according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor: “*In re præsentī, hoc est statim atque solutum est:—cæterum postea non permittitur*” (*p*). If neither applied the payment, the law made the appropriation according to certain rules of presumption depending on the nature of the debts or the priority in which they were incurred. And as it was the actual intention of the debtor, that would, in the first instance, have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, What application would be most beneficial to the debtor? The payment was consequently applied to the most burdensome debt,—to one that carried interest, rather than to that which carried none,—to one

(*m*) *Bank of Scotland v. Christie*, 8 Cl. & F. 214.

(*n*) *Clayton's Case*, 1 Meriv. 572; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Simson v. Cooke*, 1 Bing. 452; *Simson v. Ingham*, 2 B. & C. 65; *Copland v. Toulmin*, 7 Cl. & F. 349; *Bank of Scotland v. Christie*, 8 Cl. & F. 214.

(*o*) *Bosanquet v. Wray*, 6 Taunt. 597; *Brooke v. Enderby*, 2 Brod. & Bing. 70; *Kinnaird v. Webster*, 10 Ch. D. 139; *In re Sherry*; *London and County Bank v. Terry*, 25 Ch. D. 692.

(*p*) Dig. Lib. 46, tit. 3, f. 5.

secured by a penalty, rather than to that which rested on a simple stipulation;—and if the debts were equal, then to that which had been first contracted. “In his vero, quæ præsentī die debentur, constat, quotiens indistincte quid solvitur, in gravīorem causam videri solutum. Si autem nulla prægravet,—id est si omnia nomina similia fuerint, antiquiorem” (q). Pothier, in his edition of the Pandects, has collected together all the texts of the Roman law on this subject (r); and he has summed up the general results in his treatise on Obligations (s).

§ 459e. In the actual application of the doctrine to cases of partnership, where a change of the firm has occurred by a dissolution by death or otherwise, the rule is, that the estate of the deceased or retiring partner is liable only to the extent of the balance due to any

(q) Dig. Lib. 46, tit. 3, f. 5.

(r) Pothier, Pand. Lib. 46, tit. 3, art. 1, n. 89 to 99.

(s) Pothier, Oblig. by Evans, n. 528 to 535; *ibid.* n. 561 to n. 572, French, 2nd edit. 1829. It may not be without use to insert here the leading rules stated by Pothier: “First Rule. The debtor has the power of declaring on account of what debt he intends to apply the sum which he pays. The reason which Ulpian gives is evident, ‘possumus enim certam legem dicere, ei quod solvimus.’ According to our rule, although regularly the interest should be paid before the principal, yet if the debtor of the principal and interest, upon paying a sum of money, has declared that he paid on account of the principal, the creditor who has agreed to receive it cannot afterwards contest such application. Second Rule. If the debtor, at the time of paying, makes no application, the creditor to whom the money is due, for different causes, may make the application by the acquittance which he gives. It is requisite, 1st, that this application be made at the instant; 2nd, that it be equitable. Third Rule. When the application has neither been made by the debtor nor by the creditor, it ought to be made to that debt which the debtor at the time had the most interest to discharge. The application should rather be made to a debt which is not contested than to one that is; rather to a debt which was due at the time of payment than to one which was not. Among several debts which are due the application ought rather to be made to the debt for which the debtor was liable to be imprisoned than to debts merely civil, in respect of which process could only issue against his effects. Among civil debts the application should rather be made to those which produce interest than to those which do not. The application ought rather to be made to an hypothecatory debt than to another. The application ought rather to be made to the debt for which the debtor had given sureties than to those which he owed singly. The reason is, that in discharging it, he discharges himself from two creditors—from his principal creditor and from his surety, whom he is obliged to indemnify. Now, a debtor has more interest to be acquitted against two than against a single creditor. The application ought rather to be made for a debt of which the person who has paid was principal debtor, than to those which he owed as surety for other persons. Fourth Rule. If the debts are of an equal nature, and such that the debtor had no interest in acquitting one rather than the other, the application should be made to that of the longest standing. Observe, that of two debts contracted the same day, but with different terms, which are both expired, the debt of which the term was the shorter, and consequently which expired sooner, is understood to be the more ancient. Fifth Rule. If the different debts are of the same date, and in other respects equal, the application should be made proportionately to each. Sixth Rule. In debts which are of a nature to produce interest, the application is made to the interest before the principal. This holds good even if the acquittance imported that the sum was paid to the account of the principal and interest, ‘in sortem et usuras.’ The clause is understood in this sense, that the sum is received to the account of the principal after the interest is satisfied. Observe, that if the sum paid exceeds what is due for interest, the remainder is applied to the principal, even if the application had been expressly made to the interest, without mentioning the principal.”

creditor at the time of the dissolution; and that if the creditor continues to keep a running account with the survivors, or the new firm, and sums are paid to them by the creditor, and sums are drawn on their firm, and paid by them, and are charged and credited to the general account, and blended together as a common fund, without any distinction between the sums due to the creditor by the old firm and the new; in such a case, the sums paid to the creditor are deemed to be paid upon the general blended account, and go to extinguish, *pro tanto*, the balance of the old firm, in the order of the earliest items thereof. "In such a case" (it has been said by a very able judge), "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance, due on a given day, has or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head, instead of the foot of it. A man's banker breaks, owing him, on the whole account, a balance of £1,000. It would surprise one to hear the customer say: 'I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1,000 which I paid in five years ago, that I hold myself never to have drawn out; and, therefore, if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say, that it is that specific sum which is still due to me, and not the £1,000 that I paid in last week'" (t). This principle, as the language of the learned judge imports, only applies to an account current (u), and the creditor may be entitled to close the old account, and open a fresh one, and make that appropriation which shall be most favourable to him (x).

§ 459f. On the other hand, if, under the like circumstances, moneys have been received by the new firm, and drawn out by the creditor from time to time, and upon the whole, the original balance due to the creditor has been increased, but never at any time been diminished, in the hands of the firm; in such a case, the items of payment made by the new firm are still to be applied to the extinguishment of the balance of the old firm, and will discharge the share of the

(t) Sir William Grant in *Clayton's Case*, 1 Meriv. 608, 609.

(u) *The Mecca*, [1897] A. C. 286.

(x) *In re Sherry*; *London and County Bk. v. Terry*, 25 Ch. D. 692.

deceased or retiring partner to that extent, but no farther; for, in such a case, the general rule as to running accounts is applied with its full force (*y*). *A fortiori*, where payments have been made, and no new sums have been deposited by the creditor with the new firm, the payments will be applied in extinguishment, *pro tanto*, of the balance due by the old firm, in the order of the items thereof (*z*).

§ 459*g*. The cases which we have hitherto been considering, are cases of running accounts; and, under such circumstances, the rule will apply equally to cases where a part of the debt is secured by a guaranty or by sureties as well as where there are no such parties (*a*). But, where there are no such running accounts, if no special appropriation is made by the debtor, the creditor may, as we have seen (*b*), apply the money to any legal demand which he has against the debtor, whether it be a balance of an old account, or of a new account; for in such a case the interest of third persons is not concerned, and the case of running accounts constitutes, as it were, an implied appropriation by the parties to the account generally (*c*). And payments made generally by a debtor to his creditor may be applied by the creditor to a balance due to the creditor, although other debts have since been incurred, upon which the debtor has given a bond, with a surety, for security thereof (*d*). A creditor, having several debts due from the same debtor, has a right to ascribe a payment made indefinitely and without appropriation by his debtor, to whichever debt he may see fit to apply it, and is entitled to make this appropriation and election even at the latest hour, and whether a reasonable period after the payment has elapsed or not (*e*).

§ 459*h*. The rule in *Clayton's Case* does not apply to the case of a trustee or any other person in a fiduciary position, who has paid trust money in to his account at his banker's, and mixed it with his own money, and afterwards drawn out money by cheques in the ordinary manner, on the ground that we must presume a man intended to act rightly, unless we have proof to the contrary, and that therefore a

(*y*) *Palmer's Case*, 1 Meriv. 623, 624; *Sleech's Case*, 1 Meriv. 538; *Bodenham v. Purchas*, 2 B. & Ald. 39. See *In re Mason*, 3 Mont. Deac. & De G. 490; *Law Magazine*, May 1845, p. 184.

(*z*) *Sleech's Case*, 1 Meriv. 538, &c.

(*a*) Where a compromise of three different debts was made for a sum less than their face, payment to be made by instalments, and if any instalment not paid, creditor to be remitted to his original rights, and on the first debt a judgment had been recovered, making it a lien on land: *Held*, that as against subsequent incumbrancers an instalment must be applied *pro rata* to the three debts. *Thompson v. Hudson*, L. R. 6 Ch. 320.

(*b*) *Ante*, § 459 *b*.

(*c*) *Bosanquet v. Wray*, 6 Taunt. 597; *Brooke v. Enderby*, 2 Brod. & Bing. 70.

(*d*) *Kirby v. Duke of Marlborough*, 2 M. & S. 18; *Williams v. Rawlinson*, 3 Bing. 71.

(*e*) *Clayton's Case*, 1 Mer. 606; *Simson v. Ingham*, 2 B. & C. 65; *Hooper v. Keay*, 1 Q. B. D. 178; *Friend v. Young*, [1897] 2 Ch. 421; *Seymour v. Pickett*, [1905] 1 K. B. 715.

trustee must be considered to have drawn out his *own* money, in preference to the *trust* money, unless clearly intended for the purposes of the trust (f). It was held also in the case which decided this point by Fry, J., that as between two *cestuis que trust* whose money the trustee has paid in to his own account at the banker's, the rule in *Clayton's Case* does apply, but the Court of Appeal pronounced no opinion on this point.

§ 460. In cases of account not founded in any such privity of contract, but founded upon relations and duties required by law, or upon torts and constructive trust, for which equitable redress is sought, it is more difficult to trace out a distinct line, where the legal remedy ends, and the equitable jurisdiction begins.

§ 461. In our subsequent examination of this branch of jurisdiction, it certainly would not be going beyond its first boundaries to include within it all subjects which arise from the two great sources already indicated, and terminate in matters of account; namely, first, such as have their foundation in contract, or *quasi* contract, and, secondly, such as have their foundation in trusts, actual or constructive, or in torts affecting property. But, as many cases included under one head are often connected with principles belonging to the other, and as the jurisdiction of courts of equity is often exercised upon various grounds, not completely embraced in either; or upon mixed considerations; it will be more convenient, and perhaps not less philosophical, to treat the various topics under their own appropriate heads, without any nice discrimination between them. We may thus bring together in this place such topics only as do not seem to belong to more enlarged subjects, or such as do not require any elaborate discussion, or such as peculiarly furnish matter of illustration of the general principles which regulate the jurisdiction.

§ 462. Let us, then, in the first place, bring together some cases arising *ex contractu*, or *quasi ex contractu*, and involving accounts. And here, one of the most general heads is that of AGENCY, where one person is employed to transact the business of another for a recompense or compensation. The most important agencies of this sort which fall under the cognizance of courts of equity, are those of solicitors, factors, bailiffs, consignees, receivers, and stewards. In most agencies of this sort, there are mutual accounts between the parties; or, if the account is on one side, as the relation naturally gives rise to great personal confidence between the parties, it rarely happens that the principal is able, in cases of controversy, to establish his rights, or to ascertain the true state of the accounts, without resorting to a discovery from the agent. Indeed, in cases of factorage and consignments, and general receipts and disbursements of money by receivers and stewards, it can scarcely be possible, if the relation has long subsisted, that very

(f) *Knatchbull v. Hughes Hallett*, 13 Ch. D. 696.

intricate and perplexing accounts should not have arisen, where, independently of a discovery, the remedy of the principal would be utterly nugatory, or grossly defective. It would be rare, that specific sales and purchases, and the charges growing out of them, could be ascertained and traced out with any reasonable certainty; and still more rare, that every receipt and disbursement could be verified by direct and positive evidence. Courts of equity in all such agencies require that the agent should keep regular accounts of all his transactions, with suitable vouchers (*g*). And it is obvious, that if he can suppress all means of access to his books of account and vouchers, the principal would be utterly without redress, except by the searching power of discovery, and the close inspection of all books, under the authority and guidance of a master in chambers. The legal obligation of an agent to keep accounts may be displaced by the terms of his appointment, and this may be inferred from a course of dealing between the principal and his agent (*h*). Besides, agents are not only responsible for a due account of all the property of their principals, but also for all profits which they have clandestinely obtained by any improper use of that property (*i*). And the only adequate means of reaching such profits must be by discovery. In cases of fraud, also, it is almost impracticable to thread all the intricacies of its combinations, except by searching the conscience of the party, and examining his books and vouchers (*k*). An agent could not maintain a suit in equity against his principal for an account unless he made out a special case, and a servant who was to be remunerated by a share of the profits stood in the same situation (*l*).

§ 463. In agencies also of a single nature, such as a single consignment, or the delivery of money to be laid out in the purchase of an estate, or of a cargo of goods; or to be paid over to a third person: although a suit at law may be often maintainable, yet, if the thing lie in privity of contract and personal confidence, the aid of a court of equity is often indispensable for the attainment of justice. Even when not indispensable, it may often be exceedingly convenient and effectual, and prevent a multiplicity of suits. The party in such cases often has an election of remedy. This doctrine was expounded with great clearness and force by Lord Chief Justice Willes, in delivering the opinion of the court, in a celebrated case. Speaking of the propriety of sometimes resorting to a suit at law, he said: "Though a bill in equity may be proper in several of these cases, yet an action

(*g*) *Pearce v. Green*, 1 Jac. & Walk. 135; *Clarke v. Tipping*, 9 Beav. 284; *Makepeace v. Rogers*, 4 De G. J. & S. 649. See *Cookes v. Cookes*, 9 Jur. N. S. 843.

(*h*) *Tindall v. Powell*, 4 Jur. N. S. 944. Cf. *Lord Salisbury v. Wilkinson*, cited 8 Ves. 48.

(*i*) *Massey v. Davies*, 2 Ves. Jun. 318.

(*k*) *Earl of Hardwicke v. Vernon*, 14 Ves. 510.

(*l*) *Harrington v. Churchward*, 29 L. J. Ch. 521; *Smith v. Leveaux*, 2 De G. J. & S. 1.

at law will lie likewise. As if I pay money to another, to lay out in the purchase of a particular estate, or any other thing, I may either bring a bill against him, considering him as a trustee, and praying that he may lay out the money in that specific thing; or I may bring an action against him, as for so much money had and received for my use. Courts of equity always retain such bills, when they are brought under the notion of a trust; and therefore, in this very case [a consignment to a factor for sale], they have often given relief, where the party might have had his remedy at law, if he had thought proper to proceed in that way" (m).

§ 464. Perhaps the doctrine here laid down, although generally true, is a little too broadly stated. The true source of jurisdiction in such cases, is not the mere notion of a virtual trust; for then equity jurisdiction would cover every case of bailment. But it took its rise from the necessity of reaching the facts by a discovery; and having jurisdiction for such a purpose, the court, to avoid multiplicity of suits, then proceeded to administer the proper relief (n). And hence it is that in the case of a single consignment to a factor for sale, a court of equity would entertain the suit for relief, as well as discovery; there being accounts and disbursements involved, which, generally speaking, could not be so thoroughly investigated at law (o), although (as we have seen) a court of equity was cautious of entertaining suits upon a single transaction, where there were not mutual accounts. Nay, so far had the doctrine been carried, that even though the case might appear, as a matter of account, to be perfectly remediable at law; yet if the parties had gone on to a hearing of the merits of the cause, without any preliminary objection being taken to the jurisdiction of the court upon this ground, the court would not then suffer it to prevail, but would administer suitable relief.

§ 465. Cases of account between trustees and *cestuis que trust* may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of courts of equity. The same general rules apply here, as in other cases of agency. A trustee is never permitted to make any profit to himself in any of the concerns of his trust (p). On the other hand, he is not liable for any loss which occurs in the discharge of his duties, unless he has been guilty of negligence, malversation, or fraud, the burden being upon him to show matter of justification in order to relieve himself from liability (q). The same doctrine is applicable to cases of guardians and wards, and other

(m) *Scott v. Surman*, Willes 405.

(n) *Ante*, § 71; 3 Black. Comm. 437; *Mackenzie v. Johnston*, 4 Mad. 374; *Pearce v. Green*, 1 Jac. & Walk. 135.

(o) *Mackenzie v. Johnston*, 4 Mad. 374; *Barry v. Stevens*, 31 Beav. 258.

(p) *Fox v. Mackreth*, 2 Bro. C. C. 400; 2 Cox 158, 320; 4 Bro. P. C. 258; *Docker v. Somes*, 2 M. & K. 655.

(q) *Jones v. Lewis*, 2 Ves. Sen. 241; *Job v. Job*, 7 Ch. D. 562; *Briggs v. Massey*, 51 L. J. Ch. 447; *In re Brogden*; *Billing v. Brogden*, 38 Ch. D. 546.

relations of a similar nature. Directors of private companies are not allowed to make a clandestine profit out of their dealings with the companies which they manage (r).

§ 466. Cases of account between partners, between part-owners of ships, and between owners of ships and the masters, fall under the like considerations. They all involve peculiar agencies like those of bailiffs, or managers of property, and require the same operative power of discovery, and the same interposition of equity (s). The learned author compared the liability of a co-owner of property to account in equity (t) or under the statute of 4 Anne, c. 16, to his co-owner for receiving more than his share to that of a bailiff, but this view has been judicially denied (u).

§ 467. In many cases of frauds by an agent a court of common law cannot administer effectual remedies; as, for instance, it cannot give damages against his estate for a loss arising from his torts, when such torts die with the person; and *à fortiori*, the rule will apply to courts of equity, which did not, as the Chancery Division is bound to do by the Judicature Act, 1873, entertain suits for damages. But, where the tort arises, in the course of an agency, from a fraud of the agent, and respects property, courts of equity did treat the loss sustained as a debt against his estate (x).

§ 468. Courts of equity adopt very enlarged views in regard to the rights and duties of agents; and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility, or of obtaining undue recompense. If an accountable party does not keep proper and regular accounts and retain vouchers (where it is customary to give receipts) (y), the court may make a penal order, fixing the accountable party with a sum arbitrarily assessed (z); further than this he will not be allowed the compensation which otherwise would belong to his agency (a). Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own, the whole will be taken, both at law and in equity, to be the property of the principal until the agent puts the subject-matter under such circumstances that it may be

(r) *Benson v. Heathorn*, 1 Y. & C. Ch. 326; *Tyrrell v. Bank of London*, 10 H. L. C. 26.

(s) *Green v. Briggs*, 6 Hare, 395; *Turquand v. Wilson*, 1 Ch. D. 85.

(t) *Denys v. Shuckburgh*, 4 Y. & C. Ex. 42; *Job v. Cordeaux*, 4 W. R. 806; *Job v. Potton*, L. R. 20 Eq. 84.

(u) *Kennedy v. De Trafford*, [1897] A. C. 180.

(x) *Lord Hardwicke v. Vernon*, 4 Ves. 418.

(y) *Skipworth v. Skipworth*, 9 L. J. N. S. Ch. 182; *Cookes v. Cookes*, 9 Jur. N. S. 843.

(z) *Walmsley v. Walmsley*, 3 Jo. & L. 556; *Duke of Leeds v. Earl of Amherst*, 20 Beav. 239.

(a) *White v. Lady Lincoln*, 8 Ves. 363; *Gray v. Haig*, 20 Beav. 219. Cf. *Andrews v. Ramsay*, [1903] 2 K. B. 635.

distinguished as satisfactorily as it might have been before the unauthorized mixture on his part (b). In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties; but upon the ground that it is the only justice that can be done; and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal (c).

§ 469. Another head is that of APPORTIONMENT, CONTRIBUTION, and GENERAL AVERAGE, which are in some measure blended together, and require and terminate in accounts. In most of these cases, a discovery is indispensable for the purposes of justice; and where this does not occur, there were other distinct grounds for the exercise of equity jurisdiction, in order to avoid circuitry and multiplicity of actions. Some cases of this nature spring from contract; others, again, from a legal duty, independent of contract; and others, again, from the principles of natural justice, confirming the known maxim of the law, *Qui sentit commodum, sentire debet et onus*. The two latter may, therefore, properly be classed among obligations resulting *quasi ex contractu* (d). This will abundantly appear in the sequel of these Commentaries.

§ 470. And first, as to APPORTIONMENT and CONTRIBUTION, which may conveniently be treated together. Lord Coke has remarked that the word apportionment “cometh of the word *portio*, *quasi partio*, which signifieth a part of the whole, and apportion signifieth a division of a rent, common, &c., or a making of it into parts” (e). It is sometimes used to denote the distribution of a common fund, or entire subject among all those who have a title to a portion of it (f). Sometimes, indeed, in a more loose but an analogous sense, it is used to denote the contribution, which is to be made by different persons, having distinct rights, towards the discharge of a common burden or charge to be borne by all of them. In respect, then, to apportionment in its application to contracts in general, it is the known and familiar principle of the common law, that an entire contract is not apportionable. The reason seems to be, that as the contract is founded upon a consideration dependent upon the entire performance of the act, and if from any cause it is not wholly performed, the *casus fœderis* does not arise, and the law will not make provisions for exigencies which the parties have neglected to provide

(b) *Lupton v. White*, 15 Ves. 432; *re Oatway*; *Hertslet v. Oatway*, [1903] 2 Ch. 356.

(c) *Lupton v. White*, 15 Ves. 432, 441.

(d) *Dering v. Earl of Winchelsea*, 1 Cox 318; s.c. 2 Bros. & Pul. 270.

(e) Co. Litt. 147b.

(f) *Ex parte Smyth*, 1 Swanst. 338, 339, the reporter's note.

for themselves. Under such circumstances, it is deemed wholly immaterial to the rights of the other party, whether the non-performance has arisen from the design or negligence of the party bound to perform it, or to inevitable casualty or accident (*g*). In each case the contract has not been completely executed. The same rule is applied to cases where the payment is to be made under a contract upon the occurrence of a certain event or upon certain conditions. In the application of this doctrine of the common law, courts of equity have generally, but not universally, adopted the maxim, *Æquitas sequitur legem* (*h*). Whether rightly or wrongly, it is now too late to inquire, although, as a new question, there is much doubt, whether in so adopting the maxim they have not in many cases deserted the principles of natural justice and equity, as well as the analogies by which they were governed in other instances, in which they have granted relief. We have already had occasion to cite cases in which this rigid doctrine as to non-apportionment has been applied (*i*). There are, however, some exceptions to the rule both at law and in equity, which we shall presently have occasion to consider, and some in which courts of equity have granted relief, where it would at least be denied at law (*k*).

§ 471. At the common law, the cases were few in which an apportionment under contract was allowed, and general doctrine being against it, unless specially stipulated by the parties. Thus, for instance, where a person was appointed collector of rents for another, and was to receive £100 per annum for his services; and he died at the end of three-quarters of the year, while in the service; it was held, that his executor could not recover £75 for the three-quarters' service, upon the ground that the contract was entire, and there could be no apportionment; for the maxim of the law is, *Annua nec debitum judex non separat ipsum* (*l*). So, where the mate of a ship engaged for a voyage at thirty guineas for the voyage, and died during the voyage, it was held, that at law there could be no apportionment of the wages (*m*).

§ 472. Courts of equity, to a considerable extent, act upon this maxim of the common law in regard to contracts. The Court of Chancery, upon some supposed equity, allowed a claim in special cases, for the return of an apportioned part of an apprenticeship

(*g*) *Paradine v. Jane*, Aleyn 26, 27; Story on Bailments, § 36; *Ex parte Smyth*, 1 Swanst. 338, 339, the reporter's note, and cases cited.

(*h*) *Post*, § 483.

(*i*) *Ante*, §§ 101 to 104.

(*k*) *Post*, §§ 472, 479.

(*l*) Co. Litt. 150a; *Countess of Plymouth v. Throgmorton*, 1 Salk. 65, 3 Mod. 153.

(*m*) *Cutter v. Powell*, 6 T. R. 320. See now Merchant Shipping Act, 1894, ss. 156, 157, and *Button v. Thompson*, L. R. 4 C. P. 330.

(*n*) *Hirst v. Tolson*, 2 Mac. & G. 34; *Webb v. England*, 29 Beav. 44. See *ante*, § 89.

premium (*n*). Even a court of common law was beguiled into committing the same error where the master was a solicitor, and deciding “according to law and conscience, and not by any technical rules” in the exercise of an assumed jurisdiction over solicitors as officers of the court (*o*). In modern times a general or particular jurisdiction to disregard the law of contract has been disclaimed (*p*). “Courts of equity do not rectify contracts,” said James, V.-C. (*pp*). The proper course is to make a return of the premium the subject-matter of express stipulation (*q*). An apportioned part of a premium paid upon entering into a partnership may be recovered under section 40 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which embodies the earlier law (*r*), and is in these terms: “Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless (a) the dissolution is wholly or chiefly due to the misconduct of the partner who paid the premium, or (b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.” In the case of a partnership, the amount to be returned is ascertained as a simple proportion sum (*s*). This could never be justified if the rule applied to an apprenticeship, for the value of the services of an apprentice increases progressively.

§ 475. In regard to rents, the general rule at the common law leaned strongly against any apportionment thereof. Hence it was well established, that, in case of the death of a tenant for life, in the interval between two periods, at each of which a portion of rent becomes due from the lessee, no rent could be recovered for the occupation since the first of these periods (*t*). The rule seems to have been rested on two propositions: 1st, That the entire contract cannot be apportioned. 2nd, That under a lease with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire. Hence it followed, that, on the determination of a lease by the death of the lessor before the day appointed for the payment of

(*o*) *Ex parte Bayley*, 9 B. & C. 691.

(*p*) *Whincup v. Hughes*, L. R. 6 C. P. 78; *Craven v. Stubbins*, 34 L. J. Ch. 126; *Ferns v. Carr*, 28 Ch. D. 409.

(*pp*) *Mackenzie v. Coulson*, L. R. 8 Eq. 375.

(*q*) *Derby v. Humber*, L. R. 2 C. P. 247.

(*r*) *Lee v. Page*, 30 L. J. Ch. 857; *Atwood v. Maude*, L. R. 3 Ch. 369; *Lyon v. Tweddell*, 17 Ch. D. 529; *Edmunds v. Robinson*, 29 Ch. D. 170; *Yates v. Cousins*, 60 L. T. 535; *Belfield v. Bourne*, [1894] 1 Ch. 521.

(*s*) *Pease v. Hewitt*, 31 Beav. 22; *Wilson v. Johnstone*, L. R. 16 Eq. 606.

(*t*) *Clun's Case*, 10 Co. 127; *Ex parte Smyth*, 1 Swanst. 338, and note.

the rent, the event, on the completion of which the payment was stipulated, namely, occupation of the lands during the period stipulated, never occurring, no rent became payable, and in respect of time, apportionment was not in any case permitted.

§ 475a. There is a rule of administration, known as the rule in *Howe v. Lord Dartmouth* (u), which is discussed hereafter (x), and which entitles a remainderman of settled residuary estate (y) to require wasting property to be converted and invested in permanent securities. The tenant for life enjoys a correlative right where reversionary property falls into possession subsequently to the death of the testator to claim an apportioned part of the fund on the footing that it represents income (z). And where the testator's residuary estate consists of a debt which, owing to the insolvency of the debtor, is not received until after the testator's death, the tenant for life is entitled to an apportioned part of the sum received on the footing that it is interest (a).

§ 476. The common law rule as to apportionment was entirely done away with by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), which embodies and extends earlier enactments (b) to the same effect and provides, s. 2: "From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved, or made payable under any instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." S. 3: "The apportioned part of any such rent, annuity, dividend, or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before." S. 4: "All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively;

(u) 6 Ves. 96.

(x) § 1269.

(y) *Bethune v. Kennedy*, 1 M. & Cr. 114; *In re Van Stranbenzee*; *Boustead v. Cooper*, [1901] 2 Ch. 779.

(z) *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643.

(a) *Turner v. Newport*, 2 Ph. 14.

(b) 11 Geo. 2, c. 19, s. 15; 4 & 5 Will. 4, c. 22.

provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, such apportioned part shall be recoverable from such heir or other person by the executors, or other parties entitled under this Act to the same, by action at law, or suit in equity." By s. 7, the provisions of the Act are not to extend to any case in which it is or shall expressly be stipulated that no apportionment shall take place (c).

§ 477. On the other hand, cases may easily be stated where apportionment of a common charge, or, more properly speaking, where contribution towards a common charge, seems indispensable for the purposes of justice, and accordingly has been declared by the common law in the nature of an apportionment towards the discharge of a common burden. Thus, if a man, owning several acres of land, was bound in a judgment or statute or recognizance operating as a lien on the land, and afterwards he aliened one acre to A., another to B., and another to C., &c.; there, if one alienee was compelled, in order to save his land, to pay the judgment, statute, or recognizance, he was entitled at the common law to contribution from the other alienees (d). The same principle was applied in the like case, where the land descended to parceners who made partition; and then, one was compelled to pay the whole charge; contribution would lie against the other parceners. The same doctrine was also applied to co-tenants of the land, or of different parts of the land. In all these cases (and others might be mentioned), a writ of contribution would lie at the common law, or in virtue of the statute of Marlbridge (e).

§ 478. But there were many difficulties in proceeding in cases where an apportionment or contribution was allowed at the common law; for, where the parties were numerous, as each was liable to contribute only for his own portion, separate actions and verdicts were necessary against each. And thus a multiplicity of suits might take place, and no judgment in one suit was conclusive in regard to the amount of contribution in a suit against another person. The like difficulty might arise in cases where an apportionment was to be

(c) The Apportionment Act does not apply to payments under order of court: *Jodrell v. Jodrell*, L. R. 7 Eq. 461; nor to parish rates: *In re Wearmouth Crown Glass Company*, 19 Ch. D. 640. See also *Barker v. Perowne*, 18 Ch. D. 180.

(d) *Harbert's Case*, 3 Co. 12, 13.

(e) See *Harbert's Case*, 3 Co. 11b; *Dering v. Earl of Winchelsea*, 1 Cox 321; s.c. 2 Bos. & Pul. 270; Co. Litt. 165 a; *Fitzherbert*, Nat. Brev. 16.

made under a contract for the payment of money or rent, where the parties were numerous and the circumstances complicated. Whereas, in equity, all parties could at once be brought before the court in a single suit; and the decree apportioning the rent was thus conclusive upon all the parties in interest (*f*).

§ 479. But the ground of equity jurisdiction, in cases of apportionment of rent and other charges and claims, did not arise solely from the defective nature of the remedy at common law, where such a remedy existed. It extended to a great variety of cases where no remedy at all existed in law, and yet where, *ex xquo et bono*, the party was entitled to relief (*g*). Thus, for instance, where a plaintiff was lessee of divers lands upon which an entire rent was reserved, and afterwards the inhabitants of the town, where part of the lands lay, claimed a right of common in part of the lands so let, and, upon a trial, succeeded in establishing their right; in this case there could be no apportionment of the rent at law, because, although a right of common was recovered, there was no eviction of the land. But it was not doubted that in equity a bill was maintainable for an apportionment, if a suitable case for relief were made out (*h*). So where, by an ancient composition, a rent was payable in lieu of tithes, and the lands came into the seisin and possession of divers grantees, the composition would be apportioned among them in equity, though there might be no redress at law (*i*). So, where money is to be laid out in land, if the party who is entitled to the land in fee, when purchased, dies before it is purchased, the money being in the meantime secured on a mortgage, and the interest made payable half-yearly, the interest will be apportioned in equity between the heir and the administrator of the party so entitled, if he dies before the half-yearly payment is due (*k*). So, where portions are payable to daughters at eighteen or marriage, and, until the portions are due, maintenance is to be allowed, payable half-yearly at specific times, if one of the daughters should come of age in an intermediate period, the maintenance will be apportioned in equity (*l*).

§ 483. But a far more important and beneficial exercise of equity jurisdiction, in cases of apportionment and contribution, is, when incumbrances, fines, and other charges on real estate are required to be paid off, or are actually paid off, by some of the parties in interest (*m*). This subject has already come incidentally under our

(*f*) *Post*, § 483 to 488.

(*g*) *Ante*, § 472.

(*h*) *Com. Dig. Chancery*, 2 E., 4 N. 9; *Jew v. Thirkenell*, 1 Ch. Cas. 31; s.c. 3 Ch. Rep. 11.

(*i*) *Com. Dig. Chancery*, 4 N. 5, cites *Saville*, 5. See *Aynsley v. Woodsworth*, 2 Ves. & B. 331.

(*k*) *Edwards v. Countess of Warwick*, 2 P. Will. 176.

(*l*) *Hay v. Palmer*, 2 P. Will. 501. See also now, as to these, the Apportionment Act, 1870, *supra*.

(*m*) *Averall v. Wade*, L.L. & G. 252.

notice (*n*), but it requires a more ample examination in this place. In most cases of this sort there is no remedy at law, from the extreme uncertainty of ascertaining the relative proportions which different persons, having interests of a very different nature, quality, and duration in the subject-matter, ought to pay. And when there is a remedy, it is inconvenient and imperfect, because it involves multiplicity of suits, and opens the whole matter for contestation anew in every successive litigation (*o*).

§ 484. The subject may be illustrated by one of the most common cases, that of an apportionment and contribution towards a mortgage upon an estate where the interest is required to be kept down or the incumbrance to be paid. Let us suppose a case where different parcels of land or other property are included in the same mortgage, and these different parcels or properties are afterwards aliened to different purchasers or donees, each holding in fee and severalty the parcel sold or conveyed to himself. In such a case each purchaser or donee is bound to contribute to the discharge of the common burden or charge in proportion to the value which his parcel bears to the whole included in the mortgage (*p*). But to ascertain the relative values of each is a matter of great nicety and difficulty; and unless all the different purchasers could be joined in a single suit, as before the Judicature Act, 1873, they could be in equity, although not at law, the most serious embarrassments might arise in fixing the proportion of each purchaser, and in making it conclusive upon all others.

§ 485. So, if there are different persons having different interests in an estate under mortgage, as, for instance, parceners, tenants for life or in tail, remaindermen, tenants in dower or for a term of years, or for other limited interests, it is obvious that the question of apportionment and contribution in redeeming the mortgage, as well as in payment of interest, may involve the most important and intricate inquiries; and, to do entire justice, it may be indispensable that all the parties in interest should actually be brought before the court. Now, in a suit at the common law, this was absolutely impossible; for no persons could be made parties except those whose interest was joint and of the same nature and character, and was immediate and vested in possession. So that resort to a court of equity, where all these interests can be brought before the court and definitely ascertained and disposed of, is indispensable. If to this we add that, in most cases of mortgage, an account of what has been paid upon the mortgage, either by direct payments or by perception of the rents and profits of the estate, is necessary to be taken, we shall at once see that the machinery of a court of common law was very ill adapted to

(*n*) *Ante*, § 477.

(*o*) *Ante*, § 477, 478.

(*p*) *Aldrich v. Cooper*, 8 Ves. 382; *Johnson v. Child*, 4 Hare, 87; *In re Athill*; *Athill v. Athill*, 16 Ch. D. 211; *In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461.

any such purpose. But if we add, further, to all this, that there may be mesne incumbrances (*q*) and other cross equities between some of the parties, all of which are required to be adjusted in order to arrive at a just result, and to attain the full end of the law by closing up all future litigation, we shall not fail to be convinced that the only appropriate, adequate, and effectual remedy must be administered in equity. Indeed, from its very nature, as we shall have occasion to see fully hereafter, the jurisdiction over mortgages belongs peculiarly and exclusively to courts of equity.

§ 486. Very delicate, and often very intricate, questions arise in the adjustment of the rights and duties of the different parties in interest in the inheritance. In the first place, in regard to the paying off of incumbrances. Where a tenant in fee simple pays off an incumbrance the presumption is that there is a merger, and a transfer to a trustee for his benefit is not conclusive evidence that he desired to keep it alive (*r*). If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished; and the remainderman cannot be called upon for contribution unless the tenant in tail has kept alive the incumbrance, or preserved the benefit of it to himself by some suitable assignment, or has done some other act or thing which imports a positive intention to hold himself out as a creditor of the estate in lieu of the mortgage. The reason for this doctrine is, that a tenant in tail can, if he pleases, become the absolute owner of the estate; and, therefore, his discharge of incumbrances is treated as made in the character of owner, unless he clearly shows that he intends to discharge them and become a creditor thereby (*s*). But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated by the birth of issue of another person; for it must be inferred that such a tenant in tail, in paying off an incumbrance without an assignment, means to keep the charge alive (*t*). *A fortiori*, the doctrine will not apply to the case of a tenant in tail who is restrained by statute from barring his estate tail or to the case of a tenant for life paying off an incumbrance; for, if he should pay it off without taking an assignment, he would be deemed to be a creditor to the amount paid, upon the ground that there can be no presumption that, with his limited interest, he could intend to exonerate the estate (*u*). He cannot be presumed, *primâ facie*, to discharge the estate from the debt, for that would be to discharge the estate of another person from the debt. But, in both

(*q*) *Barnes v. Racster*, 1 Y. & C. Ch. 401; *Flint v. Howard*, [1893] 2 Ch. 54.

(*r*) *Hood v. Phillips*, 3 Beav. 513.

(*s*) *Kirkham v. Smith*, 1 Ves. Sen. 258; *Jones v. Morgan*, 1 Bro. Ch. C. 206.

(*t*) *Wigsell v. Wigsell*, 2 Sim. & Stu. 364; *Horton v. Smith*, 3 K. & J. 624.

(*u*) *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. Jun. 227; *Faulkner v. Daniel*, 3 Hare, 217; *In re Harvey*; *Harvey v. Hobday*, 1896, 1 Ch. 137.

cases, the presumption may be rebutted by circumstances which demonstrate a contrary intention.

§ 487. In respect to the discharge of incumbrances, it was formerly a rule in equity, that the tenant for life and the reversioner, or remainderman, were bound to contribute towards the payment of incumbrances, in a positive proportion, fixed by the court; so that they paid a gross sum, in proportion to their interests in the estate. The usual proportion was, for the tenant for life to pay one-third, and the remainderman or reversioner to pay two-thirds of the charge. A similar rule was applied to cases of fines paid upon the renewal of leases. But the rule is now, in both cases, entirely exploded; and a far more reasonable rule is adopted. It is this: that the tenant shall contribute beyond the interest, in proportion to the benefit he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest during his life (which of course will depend much upon his age and the computation of the value of his life); and it will be referred to a master, to ascertain and report what proportion of the capital sum due the tenant for life ought, upon this basis, to pay, and what ought to be borne by the remainderman or reversioner (*x*). If the estate is sold to discharge incumbrances (as the incumbrancer may insist that it shall be), in such a case, the surplus, beyond what is necessary to discharge the incumbrances, is to be applied as follows: the income thereof is to go to the tenant for life, during his life; and then the whole capital is to be paid over to the remainderman or reversioner (*y*).

§ 488. In regard to the interest due upon mortgages and other incumbrances, the question often arises by whom and in what manner it is to be paid. And here the general rule is, that a tenant for life as between himself and the remainderman is bound to keep down and pay the interest, although he is under no obligation to pay off the principal (*z*). But a tenant in tail is not bound to keep down the interest; and if he does, his personal representative has no right to be allowed the sums so paid, as a charge on the estate (*a*). The reason of this distinction is, that a tenant in tail, discharging the interest, is supposed to do it, as owner, for the benefit of the estate. He is not compellable to pay the interest; because he has the power, at any time, to make himself absolute owner against the remainderman and

(*x*) *White v. White*, 5 Ves. 24, 9 Ves. 554; *Allan v. Backhouse*, 2 Ves. & B. 65.

(*y*) *Waring v. Coventry*, 2 M. & K. 406; *Wrizon v. Vize*, 2 Dru. & War. 192; *Makings v. Makings*, 1 De G. F. & J. 470. See *Redington v. Redington*, 1 Ball & B. 131.

(*z*) *Penrhyn v. Hughes*, 5 Ves. 107; *White v. White*, 4 Ves. 33; *Lloyd v. Johnes*, 9 Ves. 37. Many cases may occur of far more complicated adjustments than are here stated; but in a treatise like the present, little more than the general rules can be indicated.

(*a*) *Amesbury v. Brown*, 1 Ves. Sen. 480, 481.

reversioner. The latter have no equity to compel him, in their favour, to keep down the interest, inasmuch, as if they take anything, it is solely by his forbearance, and, of course, they must take it *cum onere* (b).

§ 489. These remarks may suffice to show (for it is not our purpose to bring the minute distinctions upon these important subjects under a full review (c)) the beneficial operations of courts of equity, in apportionments and contributions, upon this confessedly intricate subject; and, also, how utterly inadequate a court of common law would be to do complete justice, in a vast variety of cases, which may easily be suggested. Without some proceedings, in the nature of an account before a master, there would be no suitable elements, upon which any court of justice could dispose of the merits of such cases, so as to suppress future litigation, or to administer to the conflicting rights of different parties.

§ 490. Another class of cases, which still more fully illustrates the importance and value of this branch of equity jurisdiction, is that of GENERAL AVERAGE, a subject of daily occurrence in maritime and commercial operations. General average, in the sense of the maritime law, means a general contribution, that is to be made by all parties in interests, towards a loss or expense, which is voluntarily sustained or incurred for the benefit of all (d). The principle upon which this contribution is founded, is not the result of contract, but has its origin in the plain dictates of natural law (e). It has been more immediately derived to us from the positive declarations of the Roman law, which borrowed it from the more ancient text of the Rhodian jurisprudence. Thus, the Rhodian law, in cases of jettison, declared, that, "If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all. 'Lege Rhodia' (says the Digest), 'cavetur, ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sariatur, quod pro omnibus datum est'" (f). But the principle is by no means confined to cases of jettison; but it is applied to all other sacrifices of property, sums paid, and expenses voluntarily incurred in the course of maritime voyages for the common benefit of all persons

(b) There is an exception to the general rule, that a tenant in tail is not bound to keep down the interest, which confirms, rather than impugns, the general rule. If the tenant in tail is an infant, his guardian or trustee will, in that case, be required to keep down the interest. The reason is, that the infant, of his own free will, cannot bar the remainder, and make himself absolute owner. *Sergeson v. Sealey*, 2 Atk. 416, and Mr. Saunders's note (1); *Burges v. Mawbey*, T. & R. 167.

(c) See 1 Bridgeman's Digest, *Average and Contribution*, III.; 1 Chitty, Eq. Dig. *Apportionment*.

(d) Abbott, Shipping, Pt. 3, ch. 8, § 1, p. 342; Moore, 297; Vin. Abr. *Contribution and Average*, A. pl. 1, 2, 26.

(e) *Dering v. Earl of Winchelsea*, 1 Cox 318, 323; s.c. 2 Bos. & Pul. 270, 274; *Stirling v. Forrester*, 3 Bligh 590, 596.

(f) Dig. Lib. 14, tit. 2, f. 1.

concerned in the adventure. The principle has, indeed, been confined to a sacrifice of property, and the contribution confined to the property saved thereby, although it certainly might have gone farther, and have required a corresponding apportionment of the loss or sacrifice of property upon all persons, whose lives have been preserved thereby, upon the same common sense of danger, and purchase of safety, alluded to by Juvenal, when, in a similar case, his friend desired his life to be saved by a sacrifice of his property: *Fundite, quæ mea sunt etiam pulcherrima.*

§ 491. General average being, then, as has been already stated, not confined to cases of jettison, but extending to other losses and expenditures for the common benefit, it may readily be perceived how difficult it would be for a court of law to apportion and adjust the amount, which is to be paid by each distinct interest, which is involved in the common calamity and expenditure. Take, for instance, the common case of a general ship or packet, trading between Liverpool and New York, and having on board various shipments of goods, not unfrequently exceeding a hundred in number, consigned to different persons, as owners or consignees; and suppose a case of general average to arise during the voyage, and the loss or expenditure to be apportioned among all these various shippers according to their respective interests, and the amount which the whole cargo is to contribute to the reimbursement thereof. By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board, are to contribute to such reimbursement, according to their relative values. The first step in the process of general average, is to ascertain the amount of the loss for which contribution is to be made, as, for instance, in the case of jettison, the value of the property thrown overboard, or sacrificed for the common preservation. The value is generally indefinite and unascertained, and, from its very nature, rarely admits of an exact and fixed computation. The same remark applies to the case of ascertainment of the value of the contributory interest, the ship, the freight, and the cargo. These are generally differently estimated by different persons, and rarely admit of a positive and indisputable estimation in price or value. Now, as the owners of the ship, and the freight, and the cargo, may be, and generally are, in the supposed case, different persons, having a separate interest, and often an adverse interest to each other, it is obvious, that unless all the persons in interest can be made parties in one common suit, so as to have the whole adjustment made at once, and made binding upon all of them, infinite embarrassments must arise, in ascertaining and apportioning the general average. In a proceeding at the common law, every party, having a sole and distinct interest, had formerly to be separately

sued (*g*); and as the verdict and judgment in one case was not only not conclusive, but not even admissible evidence in another suit, as it was *res inter alios acta*; and as the amount to be recovered in each case depended upon the value of all the interests to be affected, which, of course, might be differently estimated by different juries, it is manifest that the grossest injustice, or the most oppressive litigation, might take place in all cases of general average on board of general ships. A court of equity, having authority to bring all the parties before it, and to refer the whole matter to a master, to take an account, and to adjust the whole apportionment at once, afforded a safe, convenient and expeditious remedy. And it was accordingly a mode of remedy in all cases, where a controversy arose, and a court of equity existed in the place, capable of administering the remedy (*h*). But claims for general average were usually determined in common law courts. The court of Admiralty had no jurisdiction to entertain an active claim for general average (*i*), but the Admiralty Division, as a branch of the High Court, has acquired full jurisdiction in the matter (*k*), and one which is frequently exercised.

§ 492. Another class of cases, to illustrate the beneficial effects of equity jurisdiction over matters of account, is that of CONTRIBUTION BETWEEN SURETIES, who are bound for the same principal, and upon his default, one of them is compelled to pay the money, or to perform any other obligation, for which they all became bound. In cases of this sort, the surety who has paid more than his proper proportion, is entitled to receive contribution from all the others, for what he has done in relieving them from a common burden (*l*). The common law courts also allowed a surety who had paid more than his aliquot share to recover from a co-surety the amount of the excess (*m*), but the aliquot share of liability was fixed at the common law by reference to the number of sureties originally bound, and if one of the sureties became insolvent, a surety singled out by the creditor as a defendant might find his liability exceed his contemplated proportion (*n*). The equitable rule, which is that now prevailing, ascertained the proportionate liability by reference to the solvent sureties (*o*). Regard must, however, be had to the contract of the parties. Parties who have become bound by separate instrument and at separate dates, may nevertheless be co-sureties (*p*); on the

(*g*) Abbott, Shipping, Pt. 3, ch. 8, § 17.

(*h*) Ibid.; *Shepherd v. Wright*, Show. Parl. Cas. 18; *Hallett v. Bousefield*, 18 Ves. 190, 191.

(*i*) See *Cargo ex Galam*, 2 Moo. P. C. N. S. 216.

(*k*) *The Oquendo*, 38 L. T. 151.

(*l*) *Dering v. Earl of Winchelsea*, 1 Cox, 318.

(*m*) *Kemp v. Finden*, 12 M. & W. 421.

(*n*) *Browne v. Lee*, 6 B. & C. 689.

(*o*) *Hitchman v. Stewart*, 3 Drew. 271; *Dallas v. Walls*, 29 L. T. 599.

(*p*) *Dering v. Earl of Winchelsea*, 1 Cox, 318; *Whiting v. Burke*, L. R. 6 Ch. 342.

other hand, each surety may be liable only for a distinct portion of the debt (*q*). Where the obligation is based upon proportional liability, each surety must be bound as a condition precedent to the liability of any other (*r*).

§ 493. The claim certainly has its foundation in the clearest principles of natural justice; for, as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim, *Qui sentit commodum, sentire debet et onus*. And the doctrine has an equal foundation in morals; since no one ought to profit by another man's loss where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim; and, upon motives of mere caprice or favouritism, to make a common burden a most gross personal oppression. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. And the creditor is always bound in conscience, although he is seldom bound by contract, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. It can be no matter of surprise, therefore, to find, that courts of equity, at a very early period, adopted and acted upon this salutary doctrine, as equally well founded in equity and morality. The ground of relief does not, therefore, stand upon any notion of mutual contract, express or implied, between the sureties to indemnify each other in proportion (as has sometimes been argued); but it arises from principles of equity, independent of contract (*s*).

§ 494. In the Roman law analogous principles existed, although, from the different arrangements of that system, they were developed under very different modifications. By that law, sureties were liable, indeed, for the whole debt due to the creditor, but this liability was subject to three modifications. In the first place, the creditor was generally bound to proceed by process of discussion (as it is now called), in the first instance against the principal debtor, to obtain satisfaction out of his effects, before he could resort to the sureties. In the next place, in a suit against one surety, although each surety was bound for the whole debt after the discussion of the principal debtor; yet the surety in such suit had a right to have the debt apportioned among all the solvent sureties on the same obligation, so that he should be compellable to pay his own share only; and

(*q*) *Coope v. Twynam*, T. & R. 426; *Bolton v. Cooke*, 3 L. J. O. S. Ch. 87; *Pendlebury v. Walker*, 4 Y. & C. Ex. 424.

(*r*) *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75.

(*s*) *Dering v. Earl of Winchelsea*, 1 Cox 318.

this was called the benefit of division (*t*). But if a surety should pay the whole debt, without insisting upon the benefit of division, then he had no right to recourse over against his co-sureties, unless (which is the third case), upon the payment, he procured himself to be substituted to the original debt (which he might insist on) by a cession thereof from the creditor; in which case he might insist upon a payment of a proper proportion from each of his co-sureties (*u*). And, in case of the insolvency of either of the sureties, the share of the insolvent was to be apportioned upon all the solvent sureties, *pro ratâ* (*x*). The same principles in a great measure, but not in all cases, now regulate the same subject among the continental nations of Europe whose jurisprudence is derived from the civil law (*y*).

(*t*) 1 Domat, B. 3, tit. 4, § 2, art. 1, 6; Pothier on Oblig. by Evans, n. 407; Pothier, Pand. Lib. 46, tit. 1, § 5, art. 1, nn. 41 to 45; *ibid.* art. 3, nn. 51 to 61.

(*u*) 1 Domat, B. 3, tit. 4, § 4, art. 1; Pothier on Oblig. by Evans, nn. 407, 519, 520, 521 (556, 557, 558, of the French editions); Pothier, Pand. Lib. 56, tit. 1, art. 2, nn. 45 to 51.

(*x*) 1 Domat, B. 3, tit. 4, art. 2; Pothier on Oblig. by Evans, nn. 407, 415, 418, 419, 420, 421, 445, 518, 519, 520, 521 (555 to 559 of French editions); *ibid.* 282; Pothier, Pand. Lib. 46, tit. 1, art. 2, nn. 45 to 51; Dig. Lib. 46, tit. 1, f. 26; Cod. Lib. 8, tit. 1, f. 26; Cod. Lib. 8, tit. 14, f. 2. See also 1 Bell, Comm. B. 3, Pt. 1, ch. 3, § 3, arts. 283 to 286; Ersk. Inst. B. 3, tit. 3, arts. 61 to 74; 1 Domat, B. 3, tit. 1, § 3, art. 6, and Domat's note; *post*, § 635.

(*y*) Merlin, Répert. art. *Discussion*; *id.* *Division*; Pothier on Oblig. by Evans, Pt. 2, ch. 6, art. 2, nn. 407, 415, 416; *id.* Pt. 2, ch. 3, art. 8, n. 280; *id.* Pt. 3, ch. 1, art. 6, § 2, nn. 519 to 524 (556 to 559 of the French editions); 1 Domat, B. 3, tit. 1, § 3, art. 6, and Domat's note, *ibid.*; Cod. Lib. 8, tit. 14, f. 2. The same principle, in regard to the necessity of the creditors discussing the principal debtor before resorting to the surety, has been adopted in most countries deriving their jurisprudence from the civil law; but it is not universally adopted. It prevails in France, Holland, and Scotland; but not (as it seems) generally in Germany. See Mr. Chancellor Kent's learned opinion in *Hayes v. Ward*, 4 Johns, Ch. 130 to 135, where he cites the foreign authorities on this point. These authorities fully justify his statement. The following extract from that opinion may be acceptable:—"According to the Roman law, in use before the time of Justinian, the creditor, as with us, could apply to the surety, before applying to the principal. *Jure nostro est potestas creditori, relicto reo, eligendi fidejussores* (Cod. Lib. 8, tit. 41, § 5); and the same law was declared in another imperial ordinance (Cod. Lib. 8, tit. 41, § 19). But Justinian, in one of his Novels (Nov. ch. 1, entitled *Ut Creditores primo loco convenient Principalem*), allowed to sureties the exception of discussion, or *beneficium ordinis*, by which they could require that, before they were sued, the principal debtor should, at their expense, be prosecuted to judgment and execution. It is a dilatory exception, and puts off the action of the creditor against the surety, until the remedy against the principal debtor has been sufficiently exhausted. This provision in the Novels has not been followed in the states and cities of Germany, except in Pomerania (Heinecc. Elem. Jur. Germ. Lib. 2, tit. 146, § 449, 450, 451, 465); but it has been adopted in those other countries in Europe, as France, Holland, Scotland, &c., which follow the rules of the civil law (Pothier, *Traité des Oblig.* No. 407 to 414; Code Napoléon, No. 2021 to 2023; Voet, *Com. ad Pand.* tit. *De Fidejussoribus*, 46, 1, 14 to 20; Hub. *Prælec.* Lib. 3, tit. 21, § 6; Ersk. Inst. 504, § 61). A rule of such general adoption shows that there is nothing in it inconsistent with the relative rights and duties of principal and surety, and that it accords with a common sense of justice, and the natural equity of mankind." It may be well here to state that I generally cite Pothier on Obligations from Mr. Evans's edition. It is important to remark that after n. 456, in Evans's edition, the subsequent numbers differ from the common French editions, owing to Pothier having in his later editions inserted between that number and No. 457 a new section containing thirty-five

§ 494a. In equity a surety is not entitled to contribution from his co-surety until he has paid more than his just proportion of the debt (z). If there is a judicial adjudication against one of several sureties ascertaining his liability at a definite sum, he may have a judgment declaring his right to contribution from co-sureties, and ordering an indemnity, but short of this he has no right of action (a).

§ 497. If one of the sureties died, the remedy at law was only against the surviving parties; whereas, in equity, it might be enforced against the representative of the deceased party, and he would be compelled to contribute his share to a surviving surety, who had paid the whole debt (b). This latter rule now prevails in England by force of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 11.

§ 498. These are cases of contribution of a simple and distinct character. But, in cases of suretyship, others of a very complicated nature may arise, from counter equities between some or all of the parties, resulting from contract, or from equities between themselves, or from peculiar transactions regarding third persons. Thus, as already noticed, although the general rule is, that there shall be a contribution between sureties, by the rule of equity, that may be modified by express contract between them; and, in such a case, courts of equity will be governed by the terms of such contract, in giving or refusing contribution. In like manner, there may arise by implication, from the very nature of the transaction, an exemption of one surety from becoming liable to contribution in favour of another. Thus, if different sureties should be bound by different instruments, for equal portions of the debt of the same principal, and it clearly appeared that the suretyship of each was a separate and distinct transaction, there would be no right of contribution of one against the other (c). So, if there should be separate bonds, given with different sureties, and one bond is intended to be subsidiary to, and a security for, the other, in case of a default in payment of the latter, and not to be a primary concurrent security; in such a case, the sureties in the second bond would not be compellable to aid those in the first bond by any contribution (d).

numbers, so that No. 457 in Evans's edition stands in the common editions of Pothier, No. 493. See Mr. Evans's note (a) to Pothier on Oblig. Pt. 2, ch. 6, § 9, p. 306. This explanation may be useful to the reader to prevent mistakes, or supposed mistakes, in the references usually made in English and American works to Pothier. *Post*, §§ 635 to 640.

(z) *Ex parte Snowden*, *In re Snowden*, 17 Ch. D. 44; *Stirling v. Burdett*, [1911] 2 Ch. 418.

(a) *Hughes Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

(b) *Primrose v. Bromley*, 1 Atk. 89; *In re Ennis*; *Coles v. Peyton*, [1893] 3 Ch. 238.

(c) *Coope v. Twynam*, 1 T. & Russ. 426. It would be different, if it should appear that it was the same transaction split into different parts by the agreement of all the parties.

(d) *Craythorne v. Swinburne*, 14 Ves. 159; *Bolton v. Cooke*, 3 L. J. O. S. Ch. 87.

§ 498a. A question of another kind has arisen: How far, and under what circumstances, the discharge of one surety by the creditor would operate as a discharge of the other sureties from their liability. It seems now to be clearly established that a release or discharge of one surety by the creditor will operate as a discharge of all the other sureties, if their right to contribution, or other contractual right be affected thereby, but not farther or otherwise (*e*). And where a surety guarantees the performance of two or more distinct acts, it would seem that he might be discharged by the conduct of the obligee as to one or more and remain bound as to the other (*f*). The effect of altering the creditor's rights operating in discharge of the surety is discussed elsewhere (*g*).

§ 499. Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal; but they are also entitled to the benefit of all securities, which have been taken by any one of them to indemnify himself against such liabilities (*h*). And this is so although the surety who has obtained a counter security only consented to be a surety upon the terms of having the security given him, and although his co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement to receive security. For the result of the leading case of *Dering v. Earl of Winchelsea* (*i*) is that, as between co-sureties, there is to be equality of the burden and of the benefit, and therefore whatever benefit one surety has received from the principal debtor, he is bound as between himself and his co-sureties to bring that into hotch-pot, in order that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that *that* ultimate burden may be distributed between them, equally or proportionably as the case may require. Courts of equity have gone farther in their favour, and held them entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt (*k*). Thus, for example, if, at the time when the bond of the principal and surety is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt; there, if the surety pays the debt, he will be entitled to have an assignment of that mortgage, and to

(*e*) *Nicholson v. Revell*, 4 A. & E. 675; *Evans v. Bumridge*, 2 K. & J. 174; on appeal 8 De G. M. & G. 100; *Ward v. National Bk. of New Zealand*, 8 App. Cas. 755.

(*f*) *Harrison v. Seymour*, L. R. 1 C. P. 518.

(*g*) *Ante*, § 326.

(*h*) *Steel v. Dixon*, 17 Ch. D. 825; *In re Arcedeckne*; *Atkins v. Arcedeckne*, 24 Ch. D. 709; *Berridge v. Berridge*, 44 Ch. D. 168.

(*i*) 1 Cox 318.

(*k*) *Lake v. Brutton*, 8 De G. M. & G. 440; *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Aylwin v. Withy*, 30 L. J. Ch. 860; *Duncan, Fox & Co. v. N. and S. Wales Bk.*, 6 App. Cas. 1.

stand in the place of the mortgagee (l). And the same rule applies to all securities taken by the creditor subsequent to the surety becoming bound (m). And, as the mortgagor cannot get back his estate again without a reconveyance, that assignment and security will remain a valid and effectual security in favour of the surety, notwithstanding the bond is paid. This, indeed, is but an illustration of a much broader doctrine established by courts of equity, which is, that a creditor shall not, by his own election of the fund, out of which he will receive payment, prejudice the rights which other persons are entitled to; but they shall either be substituted to his rights, or they may compel him to seek satisfaction out of the fund, to which they cannot resort. It is often exemplified in cases where a party, having two funds to resort to for payment of his debt, elects to proceed against one, and thereby disappoints another party, who can resort to that fund only. In such a case, the disappointed party is substituted in the place of the electing creditor, or the latter is compelled to resort, in the first instance, to that fund which will not interfere with the rights of the other (n). The liability of the surety to the creditor was only secondary to that of the principal debtor in the eyes of the court of equity, and the surety was entitled to insist that the creditor should pursue his remedies against the debtor, or failing that that the surety should be authorized to institute proceedings in the name of the creditor who was entitled to be indemnified against the costs (o). Accordingly if the principal debtor went bankrupt, the surety was entitled to share in the dividend proportionately to the amount of the debt which he had guaranteed, and which he was called upon to pay (p). In considering the right of a surety, regard must be had to the transaction. A surety is not entitled to the benefit of a security given except in respect of that part of a debt of which he has guaranteed the payment (q). It must also be borne in mind that a party may constitute himself a principal debtor by assuming the debt of a third person (r). There only remains to be noticed the fact that the principal creditor possesses no similar right against securities exacted by the surety (s).

(l) *Gedye v. Matson*, 25 Beav. 310.

(m) *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Campbell v. Rothwell*, 47 L. J. C. P. 144; *Forbes v. Jackson*, 19 Ch. D. 615.

(n) *Aldrich v. Cooper*, 8 Ves. 382; *Trimmer v. Bayne*, 9 Ves. 209; *Hotham v. Stone*, T. & R. 227n.

(o) *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Aschuson v. Tredegar Dry Dock and Wharf Co.* [1908] 2 Ch. 401.

(p) *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Seckham*, L. R. 7 Ch. 680; *Ellis v. Emmanuel*, 1 Ex. D. 157; *Ex parte National Provincial Bk., In re Rees*, 17 Ch. D. 98.

(q) *Wade v. Coope*, 2 Sim. 155.

(r) *Reade v. Lowndes*, 23 Beav. 361; *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Nicholas v. Ridley*, [1904] 1 Ch. 192.

(s) *In re Walker; Sheffield Bkg. Co. v. Clayton*, [1892] 1 Ch. 621.

§ 499a. The principle seems in former times to have been carried farther by courts of equity, and to have authorized the surety to insist upon an assignment, not merely of collateral securities, properly speaking, but of collateral incidents and dependent rights growing out of the original debt. Thus, where the principal in a bond had been sued and gave bail, and judgment was obtained against the principal, and also against the bail, by the creditor, and afterwards the sureties on the original bonds (who had counter-bonds) were compelled to pay it, and then brought their bill in equity to have the benefit of the judgment of the creditor against the bail by having it assigned to them; it was decreed by the court accordingly. So that although the bail were themselves but sureties as between themselves and the principal debtor, yet, coming in the room of the principal debtor, as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the sureties on the original bond (*t*). This decision consequently established that the original sureties had precisely the same rights that the creditor had, and were to stand in his place. The original sureties had no direct contract or engagement by which the bail were bound to them, but only a claim against the bail through the medium of the creditor, to all whose rights, and the power of enforcing them, they were held to be entitled. This decision has been questioned; and although it may be distinguishable in its circumstances from others on which we shall have occasion to comment, yet it must now be deemed to be much shaken in point of authority. But, however this may be, it seems certain that a surety upon a second bond, given as collateral security for the original bond, has a right, upon payment of his own bond, to be substituted to the original creditor as to the first bond, and to have an assignment thereof as an independent subsisting obligation for the debt (*u*).

§ 499b. Another point of more extensive importance in practice was whether a surety who paid off the debt of the principal, for which he was bound, could require the creditor, upon such payment, to make an assignment to him of the debt and of the instrument by which it was evidenced. It was decided in *Copis v. Middleton* (*x*) that the surety had no such right. The ground of that decision was that by the payment of the debt the title derived under the instrument had become extinguished and *functus officio*; and, therefore, an assignment thereof would be utterly useless; and if the surety should afterwards sue for the debt at law in the name of the creditor, the principal might plead such payment in bar of the action. And in such a case it was held to make no difference in the right of the surety to sue, that, upon payment of the debt, he had procured an assign-

(*t*) *Wright v. Morley*, 11 Ves. 22.

(*u*) *Hodgson v. Shaw*, 3 Myl. & K. 183.

(*x*) 1 T. & Russ. 224.

ment thereof to be made to a third person, instead of to himself, for his benefit. A judgment would of course stand upon the same footing.

§ 499c. But the law in this respect was altered by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5, which enacts that "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, speciality, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, speciality, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty. And such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or equity, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made, and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than a just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

§ 500. Upon this subject the doctrines of the Roman law are as follows. Not only is the surety by that law entitled in such cases to the benefit of all the collateral securities taken by the creditor; but he is also entitled to be substituted as to the very debt itself, to the creditor, by way of cession or assignment. And upon such cession or assignment upon payment of the debt by the surety, the debt is in favour of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal. "*Fidejussoribus succurri solet, ut stipulator compellatur ei, qui solidum solvere paratus est, vendere cæterorum nomina. Cum is, qui et reum et fidejussores habens, ab uno ex fidejussoribus accepta pecunia, præstat actiones; poterit quidem dici, nullas jam esse, cum suum perceperit, et perceptione omnes liberati sunt. Sed non ita est; non enim in solutum accepit, sed quodammodo nomen debitoris vendidit. Et ideo habet actiones, quia tenetur ad id ipsum, ut præstet actiones*" (y). Here we have the doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends affirmed. The reasoning may seem a little

artificial; but it has a deep foundation in natural justice. The same doctrine stands in substance approved in all the countries which derive their jurisprudence from the civil law (z).

§ 501. The Roman law carried its doctrines yet farther, in furtherance of the great principles of equity. It held the creditor bound not to deprive himself of the power to cede his rights and securities to the surety, who should pay him the debt; and, if by any voluntary and unnecessary act of his own, such a cession became impracticable, the surety might, by what was technically called *exceptio cedendarum actionum*, bar the creditor of so much of his demand as the surety might have received by a cession or assignment of his liens and rights of action against the principal debtor. "Si creditor a debitore culpa sua causa ceciderit, propè est, ut actione mandati nihil a mandatore consequi debeat; cum ipsius vitio acciderit, ne mandatori possit actionibus cedere" (a). But this qualification should be added, that a mere omission by the creditor to collect the debt due of the hypothecated property, so that it is lost by his laches, will not discharge the sureties; but the creditor must be guilty of some wrongful act, as by a release or fraudulent surrender of the pledge, in order to discharge the surety (b).

§ 502. The same doctrine has been in some measure transfused into the English law in an analogous form, not indeed by requiring an assignment or cession of the debt to be made; but by putting the surety paying the debt, under some circumstances, in the place of the creditor (c). And if the creditor should knowingly have done any act to deprive the surety of this benefit, the surety, as against him, would be entitled to the same equity as if the act had not been done (d).

§ 502a. A surety, who executes a bond on the faith of it being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, provided the principal has executed an instrument on which the surety may sue him and become a speciality creditor of his (e). On the other hand, where a surety executed a guarantee which he altered in a material particular and thereby released other parties who had executed as sureties, he was held to be himself released from all liability, his right of proportional contribution being lost (f).

(z) Voet ad Pand. Lib. 46, tit. 1, § 27; Pothier on Oblig. by Evans, n. 275.

(a) Dig. Lib. 46, tit. 2, f. 95, § 11; Pothier, Pand. Lib. 46, tit. 1, n. 46, 47.

(b) *Macdonald v. Bell*, 3 Moo. P. C. 315, 332.

(c) *Robinson v. Wilson*, 2 Mad. 437. In the case of a Crown debtor, a surety is substituted to the prerogative of the Crown, in regard to the debt, and then is admitted to use the Crown remedies. *The King v. Bennett*, Wightw. 2 to 6; *ante*, § 499 to 499c, and notes.

(d) *Alrich v. Cooper*, 8 Ves. 388, 391, 395; *Ex parte Rushforth*, 10 Ves. 409; *Wright v. Morley*, 11 Ves. 22.

(e) *Cooper v. Evans*, L. R. 4 Eq. 45.

(f) *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75.

§ 503. There are many other cases of contribution, in which the jurisdiction of courts of equity is required to be exercised, in order to accomplish the purposes of justice. Thus, for instance, in cases of a deficiency of assets to pay all debts and legacies, if any of the legatees have been paid more than their proportion, before all the debts are ascertained, they may be compelled to refund and contribute, in favour of the unpaid debts, at the instance of creditors, at the instance of other legatees, and where the personal representative had no notice of the existence of the debt, at the instance of the executor himself (*g*). A liability to pay uncalled capital in the event of its being subsequently called up, is not a debt, and if the personal representative distributes the estate without making a provision for its discharge, there is no voluntary payment, and he may obtain a refund (*h*). This principle is applicable to all contingent liabilities, at any rate if remote (*i*).

§ 504. In like manner, contribution lies between partners for any excess, which has been paid by one partner beyond his share, against the other partners, if upon a winding up of the partnership affairs such a balance appears in his favour; or if, upon a dissolution, he has been compelled to pay any sum, for which he ought to be indemnified. The cases in which a recovery could be had at law by way of contribution between partners were very few, and stood upon special circumstances. The usual, and indeed almost the only, effectual remedy, was in equity, where an account of all the partnership transactions could be taken; and the remedy to ascertain and adjust the balance was, in a just sense, plain, adequate, and complete (*k*). It is under the same circumstances that an action of account at the common law lies; but that, as we have already seen, is in most cases a very cumbersome, inconvenient, and tardy remedy. The same remark applies to actions on sealed or on unsealed articles of partnership, where there have been any breaches of the articles; for there may be many breaches of them, during the continuance of the partnership, which scarcely admit of adequate redress in this way. This subject will, however, hereafter present itself in a more enlarged form (*l*).

§ 505. Contribution also lies between joint-tenants, tenants in common, and part owners, of ships and other chattels, in some instances for charges and expenditures incurred for the common benefit. But it seems unnecessary to dwell upon these cases, and others of a like nature, as they embrace nothing more than a plain

(*g*) *Noel v. Robinson*, 1 Vern. 94, and Mr. Raithby's notes, *ibid.*; *Newman v. Barton*, 2 Vern. 205, and Mr. Raithby's note; *Hardwick v. Mynd*, 1 Anstr. 109; *Jewon v. Grant*, 3 Swanst. 659.

(*h*) *In re Kershaw*; *Whittaker v. Kershaw*, 45 Ch. D. 320.

(*i*) *Jervis v. Wolferstan*, L. R. 18 Eq. 18.

(*k*) Partnership Act, 1890, s. 24, sub-ss. (1) and (2), s. 44; *Sadler v. Hinxman*, 5 B. & Ad. 936; *Brown v. Tapscott*, 6 M. & W. 119.

(*l*) *Post*, §§ 659 to 683.

application of principles already fully expounded (*m*). We may conclude this head with the remark, that the remedial justice of courts of equity, in all cases of apportionment and contribution, is so complete, and so flexible in its adaptation to all the particular circumstances and equities, that it has, in a great measure, superseded all efforts to obtain redress in any other tribunals.

§ 506. LIENS also give rise to matters of account; and although this is not the sole, or indeed the necessary, ground of the interference of courts of equity; yet, directly or incidentally, it becomes a most important ingredient in the remedial justice administered by them in cases of this sort. The subject, as a general head of equity jurisdiction, will more properly fall under discussion in another place. But a few considerations, touching matters of account involved in it, may be here glanced at. A lien at the common law is not in strictness either a *jus in re* or a *jus ad rem*; but it is simply a right to possess and retain property, until some charge attaching to it is paid or discharged (*n*). It generally exists in favour of artisans and others, who have bestowed labour and services upon the property, in its repair, improvement, and preservation (*o*). It has also an existence, in many other cases, by the usages of trade (*p*); and in maritime transactions, as in cases of salvage and general average (*q*). It is often created and sustained in equity, unaccompanied by possession and where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money or for purchase-money paid in anticipation of a conveyance (*r*). It is not confined to cases of mere labour and services on the very property, or connected therewith; but it often is, by the usage of trade, extended to cases of a general balance of accounts, in favour of factors and others (*s*). Now it is obvious, that most of these cases must give rise to matters of account; and as no suit is maintainable at law for the property by the owner, until the lien is discharged, and as the nature and amount of the lien often are involved in great uncertainty, a resort to a court of equity, to ascertain and adjust the account, seems, in many cases, absolutely indispensable for the purposes of justice; since, if a tender were made at law, it would be at the peril of the owner; and, if it was less than the amount due, he would inevitably be cast in the suit, and be put to the necessity of a new litigation under more favourable circumstances. So, in many cases, where a lien exists upon various parcels of land,

(*m*) *Kay v. Johnston*, 21 Beav. 536; *Pascoe v. Swan*, 27 Beav. 508; *Leigh v. Dickeson*, 15 Q. B. D. 60.

(*n*) *Jackson v. Cummins*, 5 M. & W. 342; *Forth v. Simpson*, 13 Q. B. 680.

(*o*) *Chase v. Westmore*, 5 M. & S. 180; *Steadman v. Hockley*, 15 M. & W. 553.

(*p*) *Kirkham v. Shawcross*, 6 T. R. 14; *Agra Bank's Claim, In re European Bk.*, L. R. 8 Ch. 41.

(*q*) *Baring v. Day*, 8 East, 57.

(*r*) *Mackreth v. Symmons*, 15 Ves. 329; *Rose v. Watson*, 10 H. L. C. 672.

(*s*) *Godin v. London Assce. Co.*, 1 W. Bl. 104; *Hudson v. Granger*, 5 B. & A. 27.

some parts of which have been afterwards sold to different purchasers, and the lien is sought to be enforced upon the lands of the purchaser, it may often become necessary to ascertain what parcels ought primarily to be subjected to the lien in exoneration of others; and a bill for this purpose, as well as for an account of the amount of the incumbrance, may be indispensable for the purposes of justice. Cases of pledges present a similar illustration, whenever they involve indefinite and unascertained charges and accounts.

§ 507. Let us, in the next place, bring together some few cases involving accounts, which may arise either from privity of contract or relation, or from adverse or conflicting interests.

§ 508. Under this head the jurisdiction of courts of equity in regard to RENTS AND PROFITS may properly be considered. A great variety of cases of this sort resolve themselves into matters of account, not only when they arise from privity of contract, but also when they arise from adverse claims and titles, asserted by different persons. Between landlord and tenant accounts often extend over a number of years, where there are any special terms or stipulations in the lease, requiring expenditures on one side and allowances on the other. In such cases, where there are any controverted claims, a resort to courts of equity is often necessary to a due adjustment of the respective rights of each party (*t*).

§ 509. In some instances the Court of Chancery required the plaintiff to establish his right at law before decreeing an account (*u*). This topic was of some importance when the learned author wrote, but has long since ceased to be so.

§ 510. But another class of cases is still more frequent, arising from tortious or adverse claims and titles (*x*). Thus, where a judgment creditor took the real estate of the judgment debtor in execution, it was often necessary to take an account of the rents and profits, in order to ascertain whether, and when, the debt had been satisfied, by a perception of those rents and profits. At law, the tenant under an *elegit* was not bound to answer in account, except for the extended value (*y*). But, in courts of equity, as the *elegit* was a mere security for the debt, the tenant was always compelled to account to the terre-tenant (*z*) for the rents and profits which he had actually received, deducting, of course, all reasonable charges (*a*).

(*t*) See *The King v. The Free Fishers of Whitstable*, 7 East 353.

(*u*) 1 Fonbl. Eq. Bk. 1, Ch. 3, § 3, note (*k*): *Fulteney v. Warren*, 6 Ves. 73; *Adey v. Whitstable Co.*, 17 Ves. 324.

(*x*) Bac. Abr. Account, B.

(*y*) Altered by Judgments Act, 1837 (1 & 2 Vict. c 110) s. 11. See *Price v. Varney*, 3 B. & C. 733.

(*z*) *Hele v. Lord Bezley*, 17 Beav. 14.

(*a*) *Owen v. Griffith*, 1 Ves. 250; *Ambl.* 520; *Yates v. Hambley*, 2 Atk. 362; see *Bull v. Faulkner*, 1 De G. & Sm. 685.

§ 511. It is observable that, in these cases of *elegit*, there exists a privity in law. In the ordinary cases of mesne profits, where a clear remedy existed at law, courts of equity would not interfere, but would leave the party to his remedy at law. Some special circumstances were, therefore, necessary, to draw into activity the remedial interference of a court of equity (*b*); and, when these existed, it would interfere, not only in cases arising under contract, but in some instances in cases arising under direct or constructive torts. Thus, for instance, if a man intruded upon lands, and took the profits, he was compellable to account for them (*c*). But if the wrongdoer dies there is no remedy against his estate unless it has been enriched by the proceeds improperly acquired or received (*d*).

§ 512. Other cases may be easily put where a like remedial justice is administered in equity, but, in all these cases, it will be found that there has always been some peculiar equitable ground for interference; such as fraud or accident, or mistake, the want of a discovery, some impediment at law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits (*e*). It is perfectly clear, that, if there is a trust estate, and the *cestui que trust* comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits (*f*). So, in the case of dower (of which more will presently be said), if the widow were entitled to dower, and her claim were merely upon a legal title; but she could not ascertain the lands out of which she was dowable, and came into equity for discovery and relief; she would be entitled to an account of the rents and profits, upon having her title established (*g*). So, if an heir or devisee were compelled to come into equity for a discovery of title-deeds and the ascertainment of his title, or to put aside some impediments to his recovery; there he would be entitled to an account of the rents and profits (*h*).

§ 513. Another case connected with torts was, where a recovery had been had in an ejectment, brought to recover lands, and afterwards the plaintiff was prevented from enforcing his judgment by an injunction, obtained on a bill brought by the tenant, who died before the bill is finally disposed of. In such a case, at law, the remedy by an action for the mesne profits was gone by the death of the tenant, as actions of tort did not, till the Civil Procedure Act, 1833 (3 & 4

(*b*) *Tilley v. Bridges*, Prec. Ch. 252; 1 Eq. Abr. 285.

(*c*) *Phillips v. Homfray*, L. R. 6 Ch. 770; further proceedings (1896), 1 Ch. 465.

(*d*) *Phillips v. Homfray*, 24 Ch. D. 439. Cf. *Batthyany v. Walford*, 33 Ch. D. 269.

(*e*) *Sayer v. Pierce*, 1 Ves. Sen. 232; *Curtis v. Curtis*, 2 Bro. C. C. 628, 632, 633; *Tilley v. Bridges*, Prec. Ch. 252.

(*f*) *Dormer v. Fortescue*, 3 Atk. 129.

(*g*) *Curtis v. Curtis*, 2 Bro. C. C. 620.

(*h*) *Dormer v. Fortescue*, 3 Atk. 124; *Bennet v. Whitehead*, 2 P. Will. 644; *Pulteney v. Warren*, 6 Ves. 73.

Will. 4, c. 42, s. 2), survive at law. But a court of equity would, in such a case, entertain a bill for an account of the mesne profits, in favour of the plaintiff in ejectment, against the personal representatives of the tenant; for it is inequitable that his estate should receive the benefit and profits of the property of another person. It would be a reproach to equity, if a man, who has taken the property of another, and disposed of it in his lifetime, should, by his death, throw the proceeds into his own assets, and leave the injured party remediless (*i*). It is true, that the death of the tenant cannot be treated as the case of an accident, against which a court of equity would relieve. But there seems the most manifest justice in holding, that, where property or its proceeds has come to the use of a party, the mere fact that the title has originated in a tort should not prevent the party, and his personal representatives, from rendering an account thereof.

§ 514. There was also another distinct ground, which, although not always followed out by the courts of equity, was, of itself, sufficient to maintain the jurisdiction; and that is, that in these cases a discovery was sought; and if it was effectual, then, to prevent multiplicity of suits, the court ought to decree at once the payment of the mesne profits which have been thus ascertained (*k*). But a definite and very satisfactory ground to maintain the jurisdiction in the older cases was, that it was inequitable that a wrongdoer who, by active proceedings against the injured party suspended the just operation of a suit or judgment by an injunction, should thereby deprive the other party of his rights and profits, belonging to the suit or judgment, if the merits turned out to be ultimately in favour of the latter. He used, under such circumstances, to be compelled to put the plaintiff in the original suit in the same situation as if no injunction had intervened (*l*).

§ 515. Cases of WASTE by tenants and other persons afford another illustration of the same doctrine. There were some cases in which the remedy was in a court of equity only prior to the Judicature Act, 1873 (36 & 37 Vict. c. 66), and which was consequently known as equitable waste (*m*). Thus, where one held customary lands of a manor, and opened a copper mine in the lands, and dug the ore, and sold great quantities of it in his lifetime, and then died, and his heir continued digging and disposing of the ore in like manner; upon a bill brought against the executor for an account, and against the

(*i*) *Bishop of Winchester v. Knight*, 1 P. Will. 407; *Pulteney v. Warren*, 6 Ves. 73; *Phillips v. Homfray*, 24 Ch. D. 439.

(*k*) See *Jesus College v. Bloom*, 3 Atk. 362; s.c. *Ambler*, 54; *Whitfield v. Bewitt*, 2 P. Will. 240; s.c. 3 P. Will. 267; *Dormer v. Fortescue*, 2 Atk. 282; s.c. 3 Atk. 124; *Townsend v. Ash*, 3 Atk. 336, 337.

(*l*) *Pulteney v. Warren*, 6 Ves. 73; *Grant v. Grant*, 3 Russ. 598; further proceedings, 3 Sim. 340.

(*m*) *Marquis of Lansdowne v. Marchioness of Lansdowne*, 1 Mad. 116; *Marquis of Ormond v. Kynersley*, 5 Mad. 369.

heir also for an account, it was decided, that the bill was maintainable, both against the executor and the heir. Lord Cowper seems to have entertained the jurisdiction upon general principles, and especially upon the ground that the tenant was a sort of fiduciary of the lord; and it was against conscience that he should shelter himself or his representative from responsibility for a breach of trust in a court of equity (*n*). At the present day relief is granted apart from any consideration of trust (*o*).

§ 516. The case of *Bishop of Winchester v. Knight* (*p*) has been supposed to have been decided upon the ground that, as to the executor, there was no remedy at law; and that as to the heir, there was some fraud or concealment, and a necessity for a discovery; or that, as to him, an injunction was sought. Without some one of these ingredients it would be difficult to maintain the case in its apparent extent, for there would otherwise be a complete and perfect remedy at law. And in the later commentaries upon this case, this has been the distinctive ground upon which its authority has been admitted (*q*). But, as has been pointed out, the common law remedy was inadequate and in some instances doubtful.

§ 517. Cases of waste, by the cutting down of timber by tenants, have given rise to questions of the same sort in regard to jurisdiction. In some of the cases upon this subject it seems to have been maintained that, although the remedy for waste was ordinarily at law, yet if a discovery were wanted, that alone, if it turned out to be important, and was obtained, would carry the ulterior jurisdiction to account, in order to prevent multiplicity of suits (*r*); a ground the sufficiency of which it seems difficult to resist upon general principles (*s*).

§ 518. Lord Hardwicke, upon one occasion, expounded this ground of jurisdiction very clearly (although he does not seem himself afterwards to have been satisfied with so limiting it) (*t*), and said: "Waste is a loss for which there is a proper remedy by action. In a court of law the party is not necessitated to bring an action of waste, but he may bring trover. These are the remedies, and, therefore, there is no ground of equity to come into this court. For satisfaction of damages is not the proper ground for the court to admit of these sorts of bills, but the staying of waste; because the court presumes,

(*n*) *Bishop of Winchester v. Knight*, 1 P. Will. 407.

(*o*) *Richards v. Noble*, 3 Mer. 673; *Tucker v. Linger*, 8 App. Cas. 508; *Phillips v. Homfray*, 24 Ch. D. 439.

(*p*) 1 P. Will. 407.

(*q*) *Pratt v. Brett*, 2 Mad. 62; *Parrott v. Palmer*, 3 M. & K. 632; *Haigh v. Jagger*, 2 Coll. 231.

(*r*) *Whitfield v. Bewit*, 2 P. Will. 240; *Garth v. Cotton*, 3 Atk. 751; *Lee v. Alston*, 1 Bro. C. C. 194.

(*s*) See *Barker v. Dacie*, 6 Ves. 688; *Doherty v. Allman*, 3 App. Cas. 709.

(*t*) See *Garth v. Cotton*, 3 Atk. 756; s.c. 1 Ves. Sen. 524, 546.

when a man has done waste, he may do the same again; and, therefore, will suffer the lessor or reversioner, when he brings his bill for injunction to stay waste, to pray, at the same time, for an account of the waste done. And it is upon this ground, to prevent multiplicity of suits, that this court will decree an account of waste done at the time with an injunction. Just like the case of a bill for a discovery of assets; an account may be prayed for at the same time. And though, originally, the bill was only brought for a discovery of assets, yet, to prevent a multiplicity of suits, the court will direct an account to be taken." But more logical grounds can be supplied in most instances, for the title of the tenant generally rests in agreement or is at any rate regulated by some contract (*u*). In the case of legal waste by a limited owner, the right to an account depends upon the plaintiff establishing his right to an injunction (*x*).

§ 518*a*. By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 3, it is provided that an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating the estate. Equitable waste arose where the interests of the parties were equitable (*y*), or might consist in the abuse by a legal owner of his right to commit waste to the prejudice of one entitled (even contingently) to the estate (*z*). And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35, it is provided that where there is a tenant for life impeachable for waste, and there is on the settled land timber ripe and fit for cutting, the tenant for life may, with the consent of trustees or by order of the court, cut and sell such timber, the proceeds of which shall go, as to three-fourths as capital money under the Act, and as to one-fourth to the tenant for life. In connection with the cutting of timber and the right to the proceeds when cut, a distinction between timber estates and other estates must be remembered. Upon a timber estate the felled timber and loppings become the property of the limited owner, provided the felling and topping is justifiable as a provident act of husbandry (*a*).

§ 519. In regard to TITHES, also, and, incidentally, to MODUSES and other compositions, courts of equity in England exercised an

(*u*) *Doherty v. Allman*, 3 App. Cas. 709; *Kehoe v. Marquis of Lansdowne* [1893] A. C. 451.

(*x*) *Richards v. Noble*, 3 Mer. 231; *Gent v. Harrison Johns*, 577; *Higginbotham v. Hawkins*, L. R. 7 Ch. 676.

(*y*) *Marquis of Lansdowne v. Marchioness of Lansdowne*, 1 Mad. 116; *Marquis of Ormond v. Kynersley*, 5 Mad. 369.

(*z*) *Marker v. Marker*, 9 Hare 1; *Turner v. Wright*, 2 De G. F. & J. 234.

(*a*) *Lord Lovat v. Duchess of Leeds*, 2 Dr. & Sm. 75; *Honeywood v. Honeywood*, L. R. 18 Eq. 306; *In re Harrison, Harrison v. Harrison*, 28 Ch. D. 220; *Dashwood v. Maguire* [1891] 3 Ch. 306.

extensive jurisdiction of an analogous nature (*b*). There was a very ancient jurisdiction in the Court of Exchequer in the matter of tithes until its jurisdiction in equity was abolished by 5 Vict. c. 5. Lord Nottingham is said to have stated, that the jurisdiction in the Exchequer over tithes, by bill in equity, was not earlier than the reign of Henry VIII., and that it took its rise from the Statute of Augmentations, in his reign (33 Hen. 8, c. 39) (*c*). But other persons assert that it had a more early origin; and, in respect to extra-parochial tithes, which are a part of the ancient inheritance of the crown, they insist that suits for tithes must always have fallen within the compass of the direct and substantial jurisdiction of the Court of Exchequer, as a court of revenue; and that the proper jurisdiction of tithes belonged there (*d*). Be this as it may, the jurisdiction of the Court of Chancery over the same subject seems to have been of a much later origin, or, at least, to have been matter of doubt and controversy to a much later period; the jurisdiction not having been firmly established until after the restoration of Charles II. (*e*). This concurrent jurisdiction in both courts was generally considered to be merely incidental and collateral, arising from the general equitable jurisdiction of these courts in matters of account, and in compelling a discovery (*f*). By force of the Tithe Commutation Act, 1836 (6 & 7 Will. IV. c. 71), and amending statutes all tithe was commuted into a rent-charge, moduses abolished, and provision made for the recovery of tithe rent-charge. As tithe is believed to be non-existent in any other part of the British Dominions, it seems unnecessary to refer further to the matter.

§ 521. Having passed under review some of the principal heads of Equity Jurisdiction in matters of account, which do not require any elaborate examination, or belong to subjects which peculiarly illustrate the nature of it, we may conclude this examination with some few matters which appropriately belong to the head of Account, and are incident to the exercise of this remedial jurisdiction in all its forms.

§ 522. In the first place, in all bills in equity for an account, both parties were deemed actors when the cause was before the court upon its merits. It is upon this ground that the party defendant, contrary to the ordinary course of equity proceedings, was entitled to orders in a cause to which a plaintiff alone is generally entitled. As, for instance, in such a case, a defendant might have an order for a *ne exeat regno*, even against a co-defendant (*g*). So, it is a general rule, that

(*b*) Com. Dig. Chancery, 3 C.; *id.* Dismes, M. 13.

(*c*) Harg. note to Co. Litt. 159*a*, note 290; Anon. 1 Freem. 303.

(*d*) *Hardcastle v. Smithson*, 3 Atk. 244.

(*e*) Anon., 1 Freem. 203; Anon., 2 Ch. Cas. 337; s.c. 2 Freem. 27; 1 Mad. Pr. Ch. 84.

(*f*) 3 Black. Comm. 437; Co. Litt. 159*a*, Hargrave's note, 290.

(*g*) *Done's Case*, 1 P. Will. 263.

no person but a plaintiff can entitle himself to a decree. But in bills for an account, if a balance were ultimately found in favour of the defendant, he was entitled to a decree for such balance against the plaintiff (*h*). And for a like reason, although a defendant could not ordinarily revive a suit which had not proceeded to a decree; yet, in a bill of an account, if the plaintiff died after an interlocutory decree to account, the defendant was entitled to revive the suit against the personal representatives of the plaintiff (*i*). And if the defendant died, his personal representative might revive the suit against the plaintiff (*k*). The good sense of the doctrine seems to be that, wherever a defendant may derive a benefit from further proceedings, whether before or after a decree, he may be said to have an interest in it, and consequently ought to have a right to revive it (*l*). Redemption actions, however, stand upon a different footing. No order could be made against a mortgagor plaintiff, unless his bill contained an offer to pay what should appear to be due on taking the account (*m*), and even where the bill contained an offer to redeem the court might refuse to order payment of an adverse balance (*n*).

§ 523. In the next place, there are some matters of defence, either peculiarly belonging to cases of account, or strikingly illustrative of some of the principles already alluded to, under the head of accident, mistake, or fraud. Thus, it is ordinarily a good bar to an action for an account, that the parties have already in writing stated and adjusted the items of the account, and struck the balance (*o*). In such a case a court of equity would not interfere; for under such circumstances, an action upon an account stated lay at law (*p*), and there was no ground for resorting to equity which declined to entertain an action for a bare money claim (*q*). If, however, there had been an account stated, that might be set up by way of plea, as a bar to all discovery and relief, unless some matter was shown which called for the interposition of a court of equity. As if there had been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated was in truth vitiated, and the balance was incorrectly fixed, there a court of equity would not suffer it to be conclusive upon the parties; but would allow it to be opened and re-examined. In

(*h*) *Knebell v. White*, 2 Y. & C. Ex. 15; *Stainton v. Carron Co.*, 29 L. J. Ch. 587; 30 L. J. Ch. 713; 11 L. T. N. S. 1.

(*i*) *Lady Stowell v. Cole*, 2 Vern. 219, and Mr. Raithby's note; *Horwood v. Schmedes*, 12 Ves. 311.

(*k*) *Kent v. Kent*, Prec. Ch. 197.

(*l*) *Williams v. Cooke*, 10 Ves. 406; *Horwood v. Schmedes*, 12 Ves. 311.

(*m*) *Hollis v. Bulpitt*, 13 W. R. 492.

(*n*) *Knight v. Bowyer*, 2 De G. & J. 421.

(*o*) *Taylor v. Haylin*, 2 Bro. C. C. 310; *Johnson v. Curtis*, cited in note *ibid.* *Chambers v. Goldwin*, 9 Ves. 254.

(*p*) *Lubbock v. Tribe*, 3 M. and W. 607.

(*q*) *Higginbotham v. Hawkins*, L. R. 7 Ch. 676; *Morgan v. Larivière*, L. R. 7 H. L. 433; *Rogers v. Ingham*, 3 Ch. D. 351.

cases of gross fraud, or gross mistake, or undue advantage or imposition, or where a confidential relation exists between the parties, the court, following the old practice, will generally direct the whole account to be opened, and taken *de novo*; failing proof of these matters the court will allow the account to stand, with liberty to the plaintiff to surcharge and falsify it; the effect of which is, to leave the account in full force and vigour, as a stated account, except so far as it can be impugned by the opposing party (*r*), who has the burden of proof on him to establish errors and mistakes, as a condition precedent to entitle him to have either form of order (*s*). Agreeably to these principles where a party is ordered to account generally it is not unusual to insert a direction that regard shall be had to settled accounts between the parties (*t*). A party originally entitled to re-open an account might by delay be relegated to a right to surcharge and falsify (*u*).

§ 524. The liberty to surcharge and falsify includes not only an examination of errors of fact, but of errors of law (*x*). So, in the case of *Daniell v. Sinclair* (*y*), decided by the Privy Council, on appeal from the Court of Appeal of New Zealand, it was held that, where a mortgage account had been settled on the footing of compound interest, both parties wrongly understanding the mortgage deed to require the same, that such mortgage account might be re-opened.

§ 525. These terms, "surcharge" and "falsify," have a distinct sense in the vocabulary of courts of equity, a little removed from that which they bear in the ordinary language of common life. In the language of common life we understand "surcharge" to import an overcharge in quantity, or price, or value, beyond what is just, correct, and reasonable. In this sense, it is nearly equivalent to "falsify"; for every item which is not truly charged as it should be, is false; and, by establishing such overcharge, it is falsified. But in the sense of courts of equity these words are used in contradistinction to each other. A surcharge is appropriately applied to the balance of the whole account; and supposes credits to be omitted, which ought to be allowed. A falsification applies to some item in the debits; and supposes that the item is wholly false, or in some part erroneous. This distinction is taken notice of by Lord Hardwicke; and the words used by him are so clear that they supersede all necessity for further commentary. "Upon a liberty to the plaintiff to surcharge and falsify," says he, "the *onus probandi* is always on the party having

(*r*) *Coleman v. Mellersh*, 2 Mac. & G. 309; *Williamson v. Barbour*, 9 Ch. D. 529; *Gething v. Keighley*, 9 Ch. D. 547.

(*s*) *Taylor v. Haylin*, 2 Bro. C. C. 310; *Johnson v. Curtis*, cited, *ibid.*; *Chambers v. Goldwin*, 9 Ves. 254; *In re Webb, Lambert v. Still* [1894] 1 Ch. 73.

(*t*) *Buckeridge v. Whalley*, 33 L. J. Ch. 649; *Holgate v. Shutt*, 28 Ch. D. 111.

(*u*) *Brownell v. Brownell*, 2 Bro. C. C. 62; *Müller v. Craig*, 6 Beav. 432.

(*x*) *Roberts v. Kuffin*, 2 Atk. 112.

(*y*) 6 App. Cas. 181.

that liberty; for the court takes it as a stated account, and establishes it. But, if any of the parties can show an omission, for which credit ought to be, that is a *surcharge*; or if anything is inserted that is a wrong charge, he is at liberty to show it, and that is a *falsification*. But that must be by proof on his side. And that makes a great difference between the general cases of an open account, and where [leave] only to surcharge and falsify; for such must be made out (z).''

§ 525a. It may not be superfluous to glance at one or two matters of practice which involve matters of principle. The court is now specifically empowered by the Rules of the Supreme Court, 1883, Order XXXIII. r. 3, to "give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." This rule does no more than embody the pre-existing practice going back for many years (a). Where the accounting party, by his acts, has rendered the taking of a correct account difficult or impossible, a penal order may be made against him, as by fixing him with a highly penal rate of interest (b), or making him liable for a sum arbitrarily fixed by way of damages (c), or directing that he shall be liable for the total amount shown on the debit side, but have to justify all items on the credit side (d), notwithstanding that errors are usually corrected as of right (e).

§ 526. What shall constitute, in the sense of a court of equity, a stated, or as it is generally called a settled, account, is in some measure dependent upon the particular circumstances of the case. An account in writing, examined and signed by the parties, will be deemed a settled account, notwithstanding it contains the ordinary preliminary clause, that errors are excepted (f). But in order to make an account a settled account, it is not necessary that it should be signed by the parties. It is sufficient if it has been examined and accepted by both parties (g). And this acceptance need not be express; but may be implied from circumstances; as where an account has been presented, and no objection is made thereto, after a lapse of time, varying according to the circumstances, it is treated as an acquiescence in the

(z) *Pitt v. Cholmondeley*, 2 Ves. Sen. 565, 566.

(a) *Lord Hardwicke v. Vernon*, 4 Ves. 411; *Chalmer v. Bradley*, 1 J. & W. 51; *Skipworth v. Skipworth*, 9 L. J. N. S. Ch. 182; *Allfrey v. Allfrey*, 1 Mac. & G. 87.

(b) *Walmsley v. Walmsley*, 3 Jo. & L. 556.

(c) *Duke of Leeds v. Earl of Amherst*, 20 Beav. 239.

(d) *Morehouse v. Newton*, 3 De G. & Sm. 307.

(e) *Johnson v. Curtis*, 2 Bro. C. C. 311 n.; *David v. Spurling*, 1 Russ. & M. 64.

(f) *Johnson v. Curtis*, 2 Bro. C. C. 311n; *David v. Spurling*, 1 Russ. & M. 640; *Commercial Bk. of Scotland v. Rhind*, 3 Macq. H. L. 643; the common law rule was the same; *Perry v. Attwood*, 6 Ell. & B. at p. 700.

(g) *Willis v. Jernegan*, 2 Atk. 251; *Coventry v. Barclay*, 3 De G. J. & S. 320.

correctness of the account, which is to be, therefore, deemed a settled account (*h*). In truth, in each case, the rule admits, or rather requires, the same general exposition. It is, that an account rendered shall be deemed an account stated, from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time. That reasonable time is to be judged of, in ordinary cases, by the habits of business at home or abroad; and the usual course is required to be followed, unless there are special circumstances to vary it, or to excuse a departure from it. A customer is not bound to examine his banker's pass book, immediately upon receiving it, but may be fixed with notice of matters therein contained after the lapse of time which the law considers reasonable (*i*). Conversely a banker is allowed to correct errors in the passbook (*k*), but if he omits doing so for a considerable time the customer may be entitled to treat the balance shown as his own private property (*l*). And this last-mentioned ground of estoppel is applicable where a party changes his position by reason of a faulty account (*m*).

§ 527. Upon like grounds, *à fortiori*, a settled account will be deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy is shown. For it would be most mischievous to allow settled accounts between the parties, especially where vouchers have been delivered up or destroyed, to be unravelled, unless for urgent reasons, and under circumstances of plain error, which ought to be corrected. And, in cases of settled accounts, the court will not generally open the account; but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud (*n*).

§ 528. In regard to acquiescence in stated accounts, although it amounts to an admission, or presumption, of their correctness, it by no means establishes the fact of their having been settled, even though the acquiescence has been for a considerable time. There must be other ingredients in the case to justify the conclusion of a settlement (*o*).

§ 529. It was, too, a most material ground, in all bills for an account, to ascertain whether they were brought to open and correct errors in the account *recenti facto*; or whether the application was made after a great lapse of time. In cases of this sort, where the

(*h*) *Willis v. Jernegan*, 2 Atk. 251; *Tickel v. Short*, 2 Ves. 239; *Hunter v. Belcher*, 2 De G. J. & S. 194; *Parkinson v. Hanbury*, 2 De G. J. & S. 450; *affd.* L. R. 2 H. L. 1.

(*i*) *Cavendish v. Greaves*, 24 Beav. 163; *Kapitagilla Rubber Estates v. National Bk of India*, (1909), 2 K. B. 1010.

(*k*) *Commercial Bk. of Scotland v. Rhind*, 3 Macq. H. L. 463.

(*l*) *Skyring v. Greenwood*, 4 B. & C. 281; *Shaw v. Picton*, 4 B. & C. 715.

(*m*) *Cave v. Mills*, 7 H. & N. 913.

(*n*) *Brownell v. Brownell*, 2 Bro. C. C. 62; *Davis v. Spurling*, 1 Russ. & M. 64; *Millar v. Craig*, 6 Beav. 433; *Wier v. Tucker*, L. R. 14 Eq. 25.

(*o*) *Lord Clancarty v. Latouch*, 1 Ball & B. 428; *Irving v. Young*, 1 Sim & Stu. 333.

demand was strictly of a legal nature, or might be cognizable at law, courts of equity governed themselves by the same limitations as to entertaining such suits as were prescribed by the Statute of Limitations in regard to suits in courts of common law in matters of account. If, therefore, the ordinary limitation of such suits at law was six years, courts of equity would follow the same period of limitation (*p*). In so doing, they did not act, in cases of this sort (that is, in matters of concurrent jurisdiction) so much upon the ground of analogy to the Statute of Limitations, as positively in obedience to such statute (*q*). But where the demand was not of a legal nature, but was purely equitable; or where the bar of the statute was inapplicable; courts of equity had another rule, founded sometimes upon the analogies of the law, where such analogy existed, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence (*r*). Hence, in matters of account, although not barred by the Statute of Limitations, courts of equity refused to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions had become obscure by time, and the evidence might have been lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *Vigilantibus, non dormientibus, jura subveniunt*. Under peculiar circumstances, however, excusing or justifying the delay, courts of equity would not refuse their aid in furtherance of the rights of the party; since in such cases there was no pretence to insist upon laches or negligence, as a ground for dismissal of the suit (*s*); and in one case carried back the account over a period of fifty years (*t*). But at the present day the Chancery Division of the High Court is as much bound by the Statutes of Limitations as is any other division of the High Court.

(*p*) *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 629; *Smith v. Clay*, 3 Bro. C. C. 639, note.

(*q*) *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 629, 631.

(*r*) *Millar v. Craig*, 6 Beav. 433; *Pritt v. Clay*, 6 Beav. 503.

(*s*) *Lopdell v. Creagh*, 1 Bligh N. S. 255.

(*t*) *Stainton v. Carron Co.*, 24 Beav. 346; further proceedings, 29 L. J. Ch. 587; on appeal 30 L. J. Ch. 713; in H. L., 11 L. T. N. S. 1.

CHAPTER IX.

ADMINISTRATION.

§ 530. HAVING thus gone over some of the more important cases in which matters of account are involved, as the principal, and sometimes as the exclusive ground of jurisdiction, we shall now take leave of this part of the subject, and proceed to the consideration of other branches of concurrent jurisdiction in equity, in which, although accounts are sometimes involved, yet the jurisdiction is derived from, or essentially connected with, other sources of jurisdiction; and accounts, whenever taken, are mere incidents to other relief.

§ 531. And, in the first place, the jurisdiction of courts of equity in the administration of the assets of deceased persons. The word *assets* (a) is derived from the French word *assez*, which means sufficient, or enough; that is, sufficient, or enough, in the hands of the executor or administrator, to make him chargeable to the creditors, legatees, and distributees of the deceased, so far as the personal property of the deceased extends, which comes to the hands of the executor or administrator for administration. In an accurate and legal sense, all the personal property of the deceased which is of a saleable nature, and may be converted into ready money, is deemed assets (b). But the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to that purpose, is in a large sense assets (c).

§ 532. It has been said that the whole jurisdiction of courts of equity in the administration of assets is founded on the principle that it is the duty of the court to enforce the execution of trusts, and that the executor or administrator who has the property in his hands is bound to apply that property to the payment of debts and legacies, and to apply the surplus according to the will of the testator, or, in case of intestacy, according to the Statute of Distributions; so that the sole ground on which courts of equity proceed, in cases of this kind, is to be deemed the execution of a trust (d).

(a) A misreading of the scribes' flourish, further exemplified in the conventional abbreviation, viz., for *videlicet*. Cf. *Butler and Baker's Case*, 3 Co., at fo. 35b, where "escroll" of the text becomes the more familiar "escrow" in the shoulder note.

(b) 2 Black. Comm. 510; Toller on Executors, B. 2, ch. 1, p. 137.

(c) Black. Comm. 244, 340; Toller on Executors, B. 3, ch. 8, p. 409.

(d) *In re Thomas, Sutton Carden & Co. v. Thomas* [1912], 2 Ch. 348.

§ 533. This is certainly a very satisfactory foundation on which to rest the jurisdiction in many cases; for, under many circumstances, as an execution of a trust, the subject would be properly cognizable in equity, and especially if the party would not be chargeable at law, since it was the ordinary reason for a court of equity to grant relief that the party was remediless at law. It has also been truly said that the only thing inquired of in a court of equity is, whether the property bound by a trust has come into the hands of persons who are either bound to execute the trust or to preserve the property for the persons entitled to it. If we advert to the cases on the subject we shall find that trusts are enforced not only against those persons who are rightfully possessed of trust property as trustees, but also against all persons who come into possession of the property bound by the trust, as purchasers for value with notice of the trust, or transferees who have not given value (commonly called volunteers), whether they have notice of the trust or not. And whosoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust (e).

§ 534. Certainly to no persons can these considerations more appropriately apply than to executors and administrators, and those claiming under them, with notice of the administration and assets. But if it were the sole ground of sustaining the jurisdiction, that it is the case of a trust cognizable in equity alone, it would follow that, instead of being a matter of concurrent jurisdiction, it would be a matter belonging to the exclusive jurisdiction of equity. For, although equity does not purport to entertain jurisdiction of all trusts—some of them, such as cases of bailments, being ordinarily cognizable at law (f)—yet, of such trusts as are peculiar to courts of equity, the jurisdiction is exclusive in such courts. Now, we all know that, formerly, both the courts of common law and the ecclesiastical courts had cognizance of administrations, and many suits respecting the administration of assets were daily entertained therein. Courts of equity, therefore, in assuming general jurisdiction over cases of administration, did indeed, in some measure, found themselves upon the notion of a constructive trust in the executors or administrators (g). But the fact of there being a constructive trust was not the sole ground of jurisdiction. Other auxiliary grounds also existed, such as the necessity of taking accounts, and the consideration that the remedy at law, when it existed, was not plain, adequate, and complete. The jurisdiction, therefore, now assumed by courts of equity to so

(e) *Thorndike v. Hunt*, 3 De G. & J. 563; *Hennessey v. Bray*, 33 Beav. 96; *Sheriff v. Butler*, L. R. 2 Eq. 549. A stranger who has received assets from an executor *de son tort* cannot be called to account as executor *de son tort*, though the assets can be followed in equity in his hands. *Hill v. Curtis*, L. R. 1 Eq. 90. See *Rayner v. Koehler*, L. R. 14 Eq. 262.

(f) Black. Comm. 431, 432.

(g) Bac. Abr. *Legacy*, M.

wide an extent over all administrations and the settlement of estates, in cases of testacy and intestacy, is not (as it should seem) exclusively referable to the mere existence of a constructive trust which is often sufficiently remediable at law; but it is referable to the mixed considerations already adverted to, each of which has a large operation in equity.

§ 535. A little attention to the nature of the jurisdiction exercised in the courts of common law and formerly by the ecclesiastical courts in cases of administrations will abundantly show the necessity of the interposition of courts of equity. In the first place, in suits at common law, nothing more could be done than to establish the debt of the creditor; and if there were any controversy as to the existence of the assets and a discovery were wanted, or if the assets were not of a legal nature, or if a marshalling of the assets were indispensable to a due payment of the creditor's claim, it is obvious that the remedy at law could not be effectual. But there might be other interests injuriously affected by the judgment of a court of common law in a suit by a creditor, which injury that court could not redress or prevent, but which courts of equity could completely redress or prevent.

§ 536. In the next place, as to the ecclesiastical courts. They had, it is true, an ancient jurisdiction over the probate of wills and the granting of administrations; and, as incident thereto, an authority to enforce the payment of legacies of personal property (*h*). But although an executor or administrator was compellable by statute to account before the Ordinary or Ecclesiastical Judge, yet the Ordinary might waive this obligation and in any event was to take the account as given in by the executor or administrator, and could not oblige him to prove the items of it or to swear to the truth of it (*i*).

§ 537. The statute of 31 Edw. 3, c. 11, put executors and administrators upon the same footing as to accounting for assets, but it in no manner whatsoever changed the mode of accounting by either of them (*k*). A legatee might falsify the account of an executor or administrator in the spiritual court, as might also the next of kin, since the Statute of Distributions of 22 & 23 Car. 2, c. 10. But a creditor of the estate could not falsify the account in the ecclesiastical court, for his proper remedy was held to be at the common law (*l*). By the statute of 21 Hen. 8, c. 5, s. 4, executors and administrators were bound to deliver an inventory of the effects of the deceased upon oath to the Ordinary. But the inventory could not be controverted

(*h*) Black. Comm. 494; 3 Black. Comm. 98; Bac. Abr. *Legacies*, M.; 2 Fonbl. Eq. B. 4, ch. 1, § 1, and notes; *Marriott v. Marriott*, 1 Str. 666.

(*i*) 2 Fonbl. Eq. B. 4, ch. 3, § 2, and note (*d*); *Boone's Case*, T. Raym. 470; *Archbishop of Canterbury v. Wills*, 1 Salk. 315.

(*k*) 2 Black. Comm. 496; 4 Burns, Eccles. Law, *Wills, Distribution, Account*, viii. p. 368.

(*l*) *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1922; *Archbishop of Canterbury v. Wills*, 1 Salk. 315.

in the ecclesiastical courts by a creditor, but only by a legatee (*m*). Even an administration bond could not be broken by an omission to pay a creditor's debt; but it was a security merely for those who are interested in the estate (*n*). Indeed, before the Statute of Distributions, it was a matter greatly debated whether an administrator could be compelled to make any distribution of an intestate's estate; and, for a great length of time, it was held that an executor was in all cases entitled to the personal estate of his testator not disposed of by his will (*o*).

§ 538. The jurisdiction of the ecclesiastical courts being so manifestly defective in the case of creditors, resort was almost necessarily had to courts of equity, to compel a discovery of assets and an account. And where a creditor did not seek a general settlement of the estate by a suit on behalf of himself and all other creditors, still, he was entitled to a discovery in courts of equity, to enable him to recover his own debt in an action at law (*p*).

§ 539. In regard to legatees, also, the remedy was in many cases quite as defective. No remedy lay at the common law in cases of pecuniary legacies (*q*); and although (as has been stated) a remedy did lie in the spiritual courts; yet, in a great variety of cases, that remedy was insufficient and imperfect. Thus, if payment of a legacy were pleaded to a suit in the ecclesiastical courts, and there was but one witness of the fact (which the ecclesiastical courts would not admit as sufficient proof, for their law required two), there the temporal courts would grant a prohibition to further proceedings (*r*). So, formerly, if a husband should sue for a legacy in the ecclesiastical courts, the Court of Chancery would prohibit him; because the ecclesiastical courts could not compel him to make any settlement on his wife in consideration of the legacy (*s*). So, if a legacy were due to an infant, the Court of Chancery would interfere, at the instance of the executor, and prevent the spiritual courts from proceeding, because the executor might be entitled to a bond to indemnify him, and to a refund in case of a deficiency of assets (*t*). Many other cases might be put of a like nature.

§ 540. But a stronger instance may be stated. If the testator did not dispose of the residue of his estate; and yet, from the circum-

(*m*) *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1922.

(*n*) *Archbishop of Canterbury v. Wills*, 1 Salk. 315; *Greenside v. Benson*, 3 Atk. 248, 252; *Ashley v. Baillie*, 2 Ves. 368; *Wallis v. Papon*, Ambler 183; *Archbishop of Canterbury v. House*, Cowp. 140; *Thomas v. Archbishop of Canterbury*, 1 Cox 399.

(*o*) 2 Black. Comm. 514, 515; Toller on Executors, B. 3, ch. 6, p. 369.

(*p*) Com. Dig. Chancery, 2 C. 3; id. 3, B. 1, 2.

(*q*) *Deeks v. Strutt*, 5 T. R. 690.

(*r*) Bac. Abr. Legacy, M.; 3 Black. Comm. 112.

(*s*) 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (*d*).

(*t*) *Horrell v. Waldron*, 1 Vern. 26; *Noel v. Robinson*, 1 Vern. 91. But see *Anon.*, 1 Atk. 491; *Hawkins v. Day*, Ambler 162.

stances of the will, the executor was plainly not entitled to the residue, there he would be held liable to distribute it, as a trustee for the next of kin. But the spiritual courts had no jurisdiction whatsoever in such a case to enforce a distribution; for trusts were not cognizable in those courts, and could not be enforced by them (u). Even in the common case of a legacy of personal estate, the legacy does not vest in the legatee until the executor assents to it; and until he assented, it could not be sued for in the spiritual courts. But courts of equity consider the executor to be a trustee of the legatee, and will compel him to assent to and pay the legacy as a matter of trust (x). And if there were no legal assets to pay a legacy, although there were ample equitable assets, the spiritual courts could not enforce payment of the legacy; for they had no jurisdiction over equitable assets (y).

§ 541. In cases of distribution of the residue of estates, the remedy in the spiritual courts was also, on other accounts, exceedingly defective: for those courts did not possess any adequate means for a perfect ascertainment of all the debts; or to compel a payment of them, when ascertained, so as to fix the precise residuum; or to protect the executor or administrator in his administration, according to their decree. Besides, the interposition of a court of equity may be required for many other purposes, before a final settlement and distribution of the estate; as, for instance, to compel an executor to bring the funds into court, or to give security for the payment of debts, legacies, and distributive shares, where there is danger of insolvency, or he is wasting the assets, or where the debts, legacies, and distributive shares are not presently payable, or payment cannot be presently enforced (z).

§ 542. The jurisdiction of courts of equity to superintend the administration of assets, and decree a distribution of the residue, after payment of all debts and charges among the parties entitled either as legatees or as distributees, does not seem to have been thoroughly established until near the close of the reign of Charles II. The objection was then made that the spiritual courts had full authority, under the Statute of Distributions, to decree a distribution of the residue. But upon a demurrer filed to a bill for a distribution, it was held, by the Lord Chancellor, that, there being no negative words in the Act of Parliament (the Statute of Distributions), the jurisdiction of the Court of Chancery was not taken away; for the remedy in Chancery was more complete and effectual than that in the spiritual courts; or, to use the language of the court upon that occasion,

(u) *Farrington v. Knightley*, 1 P. Will. 545, 548.

(x) *Wind v. Jekyll*, 1 P. Will. 572; *Attenborough v. Solomon*, 1913, A. C. 76.

(y) *Barker v. May*, 9 B. & C. 489.

(z) *Strange v. Harris*, 3 Bro. C. C. 365; *Blake v. Blake*, 2 Sch. & Lefr. 26; *Scott v. Becher*, 4 Pri. 346; *Danby v. Danby*, 5 Jur. N. S. 54; *In re Braithwaite*, *Braithwaite v. Wallis*, 21 Ch. D. 121.

the spiritual court in that case had but a lame jurisdiction (*a*). And, although, ordinarily, in cases of concurrent jurisdiction, the decree of the court first having possession of the cause is held conclusive; yet courts of chancery have not held themselves bound by decrees of the spiritual courts in cases of distribution, from their supposed inability to do entire justice (*b*).

§ 543. By the Court of Probate Act, 1857 (20 & 21 Vict. c. 85), ss. 3, 4, and 23, the jurisdiction of the ecclesiastical courts over testamentary matters was taken away and transferred to the Queen, to be exercised by a Court of Probate then created; but it was provided that no suits for legacies or suits for the distribution of residues should be entertained by that court, or by any court or person whose jurisdiction as to matters and causes testamentary was abolished. The immediate effect of this statute was to confer an exclusive jurisdiction upon the Court of Chancery to settle the administration of estates, and this jurisdiction was transferred to the Chancery Division of the High Court by the Judicature Act, 1873 (36 & 37 Vict. c. 66). There is now a general concurrent jurisdiction in the Court of Bankruptcy (*c*), and a limited concurrent jurisdiction in the County Court (*d*).

§ 544. The application for aid and relief in the administration of estates is sometimes made by the executor or administrator himself, when he finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate except under the direction of a court of equity. In such a case it is competent for him to institute a suit against the creditors generally, for the purpose of having all their claims adjusted, and a final decree settling the order and payment of the assets (*e*). These used to be called bills of conformity (probably because the executor or administrator in such case undertook to conform to the decree, or the creditors were compelled by the decree to conform thereto); and they were not encouraged, because they had a tendency to take away the legal preference which one creditor might gain over another by his diligence. Besides, it was said that these bills might be made use of by executors and administrators to keep creditors out of their money longer than they otherwise would be (*f*). However correct these reasons may be for a refusal to interfere in ordinary cases involving no difficulty, they are not sufficient to show that the court ought not to interfere in behalf

(*a*) *Matthews v. Newby*, 1 Vern. 133; *Howard v. Howard*, 1 Vern. 134; *Buckle v. Atleo*, 2 Vern. 37; *Pettit v. Smith*, 1 P. Will. 7, 1 Mad. Pr. Ch. 467.

(*b*) See *Bissell v. Axtell*, 2 Vern. 47, and Mr. Raithby's note.

(*c*) *In re Baker, Nicholls v. Baker*, 44 Ch. D. 262.

(*d*) County Court Act, 1888 (51 & 52 Vict. c. 43), s. 67.

(*e*) Com. Dig. Chancery, 3 G. 6; *Buckle v. Atleo*, 2 Vern. 37.

(*f*) *Morrice v. Bank of England*, Cas. temp. Talb. 224.

of an executor or administrator under special circumstances where injustice to himself or injury to the estate may otherwise arise (*g*).

§ 545. A doubt was, indeed, suggested whether a bill could be maintained against all the creditors (*h*). But if the bill was brought against certain known creditors who were proceeding at law, it may be asked, What was the difficulty of proceeding in the same way as was done as to all creditors, upon a bill brought by one or more creditors in behalf of themselves and all other creditors? Upon a decree for the executor or administrator to account, all the creditors were or might be required to present and prove their debts before the master in the one case as in the other. But upon such a bill, brought by an executor or administrator, the court would not formerly interpose, by way of injunction, to prohibit creditors proceeding at law, until there had been a decree against the executor or administrator to account in that suit; for, otherwise, the latter might without reason make it a ground of undue delay of the creditors (*i*).

§ 545a. A bill might also be maintained by personal representatives for a discovery of assets belonging to the deceased (*k*).

§ 546. But the more ordinary case of relief, sought in equity in cases of administration, is by creditors. A single creditor may proceed for payment of his own debt, and seek a discovery of assets for this purpose only (*l*). If he does so, and the proceedings are maintainable, the court does not decree a general account of debts; but the common course is to direct an account of the personal estate, and of that particular debt which is ordered to be paid in the due course of administration (*m*). If the debt is admitted or proved, and the personal representative admits assets, the creditor takes an order for immediate payment, and there is no necessity for a judgment for administration or for accounts and enquiries (*n*).

§ 547. The more usual course, however, pursued in the case of creditors, was for one or more creditors to file a bill (commonly called a creditors' bill) by and on behalf of him, or themselves, and all other creditors who should come under the decree, for an account of the assets and a due settlement of the estate (*o*). And this applies as well when the party suing is a creditor whose debt is payable *in presenti*, as when his debt is due *in futuro*, if it be *debitum in presenti, solvendum in futuro* (*p*); and whether he has a mortgage or not (*q*). Bills of

(*g*) Com. Dig. Chancery, 3 G. 6.

(*h*) *Rush v. Higgs*, 4 Ves. Jun. 638, 643.

(*i*) *Ibid.*

(*k*) *Wright v. Bluck*, 1 Vern. 106. See *Walsh v. Stoddart*, 4 Dr. and War. 159.

(*l*) *Dulwich College v. Johnson*, 2 Vern. 49.

(*m*) *Morrice v. Bank of England*, Cas. temp. Talb. 217; *Perry v. Phelps*, 10 Ves. 38.

(*n*) *Woodgate v. Field*, 2 Hare, 211.

(*o*) See the case of *The Creditors of Sir Charles Cox*, 3 P. Will. 343.

(*p*) *Whitmore v. Oxborrow*, 2 Y. & C., Ch. 13.

(*q*) *Greenwood v. Firth*, 2 Hare 241, note; *Aldridge v. Westbrook*, 5 Beav. 138.

this sort have been allowed upon the mere principle that, as executors and administrators have vast powers of preference at law, courts of equity ought, upon the principle that equality is equity, to interpose upon the application of any creditor by such a bill, to secure a distribution of the assets without preference to any one or more creditors (*r*). And as a decree in equity is held of equal dignity and importance with a judgment at law, a decree upon a bill of this sort, being for the benefit of all creditors, makes them all creditors by decree upon an equality with creditors by judgment, so as to exclude, from the time of such decree, all preferences in favour of the latter (*s*).

§ 548. The usual decree, in the case of creditors' bills against the executor or administrator, is (as it is commonly phrased) *quod computet*, that is to say, it directs the master to take the accounts between the deceased and all his creditors; and to cause the creditors, upon due public notice, to come before him to prove their debts, at a certain place, and within a limited period; and it also directs the master to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges, in a due course of administration (*t*). In all cases of this sort, any person interested in estate as beneficiary or creditor is entitled to appear before the master, and may there, if he chooses, contest the claim of any other person claiming to be a creditor, in the same manner as if it were an adversary suit (*u*).

§ 548a. Under the practice introduced by the Rules of the Supreme Court 1883, O. LV., r. 4, it is usual to apply for administration of the real and personal estate of a deceased person by a summons designated an originating summons, and if the plaintiff resorts to a writ he may be visited with the increased costs of choosing the more expensive remedy (*x*). And in matters within the jurisdiction of the County Court, should resort to that tribunal at the risk of being under the life penalty (*y*). There is no reason why the Bankruptcy Court should be resorted to in preference to the High Court (*z*). The persons entitled to sue out a summons for administration in the High Court are, by Order LV., rules 3 & 4, the executors and

(*r*) *Rush v. Higgs*, 4 Ves. Jun. 638, 643; *Gilpin v. Lady Southampton*, 18 Ves. 469.

(*s*) *Morrice v. Bank of England*, Cas. temp. Talb. 217; *Perry v. Phelps*, 10 Ves. 38, 39, 40; *Brooks v. Reynolds*, 1 Bro. C. C. 183; *Paxton v. Douglas*, 8 Ves. 520.

(*t*) *The Creditors of Sir Charles Cox*, 3 P. Will. 343.

(*u*) *Shewen v. Vanderhorst*, 1 Russ. & M. 347; *Fuller v. Redman*, 26 Beav. 614; *Moodie v. Bannister*, 4 Drew. 432, *In re Wenham*, *Hunt v. Wenham* [1892] 3 Ch. 59; *Midgley v. Midgley* [1893] 3 Ch. 282.

(*x*) *In re Johnson*, *Wragg v. Shand*, 53 L. T. 136; *In re Francke*, *Drake v. Francke*, 57 L. J. Ch. 437.

(*y*) See *Browne v. Rye*, L. R. 16 Eq. 343; *Crozier v. Dowsett*, 31 Ch. D. 67.

(*z*) *In re Baker*, *Nichols v. Baker*, 44 Ch. D. 262.

administrators of a deceased person, or a creditor, devisee, legatee, next of kin, or heir at law of a deceased person.

§ 549. As soon as the decree to account was made in such a suit, brought in behalf of all the creditors; and not before, the executor or administrator was, before the Judicature Act, 1873, entitled to an injunction out of Chancery, to prevent any of the creditors from suing him at law, or proceeding in any suits already commenced, except under the direction and control of the court of equity, where the decree was passed (*a*). The object of the court, under such circumstances, was to compel all the creditors to come in and prove their debts before the master; and to have the proper payments and discharges made under the authority of the court; so that the executor or administrator might not be harassed by multiplicity of suits, or a race of diligence be encouraged between different creditors, each striving for an undue mastery and preference. And this action of the court presupposed, that all the legal rights of every creditor, and the validity of his debt, might be, and, indeed, must be, determined in equity, upon the same principles as it would be at law (*b*). But, in order to prevent any abuse of such bills, by connivance between an executor or administrator and a creditor, it was a common practice to grant an injunction only, when the answer or affidavit of the executor or administrator stated the amount of the assets, and upon the terms of his bringing the assets into court, or obeying such other order of the court, as the circumstances of the case might require (*c*). The same remedial justice was applied, where the application, instead of being made by creditors, was made by legatees or trustees (*d*). Now by the Judicature Act, 1873, s. 24, sub-s. 5, the same result would be obtained by an application to the court in which the creditor is suing, to stay proceedings on the ground that an administration action is pending in the Chancery Division; or by a counter-claim for administration followed by an application for a transfer of the action to the Chancery Division.

§ 550. The considerations already mentioned apply to cases where the assets are purely of a legal nature; and no peculiar circumstances require the interposition of courts of equity, except those appertaining to the necessity of taking an account, and having a discovery, and decreeing a final settlement of the estate. But in a great variety of cases, the jurisdiction of courts of equity became indispensable, from the fact, that no other courts possessed any adequate jurisdiction to

(*a*) *Morrice v. Bank of England*, Cas. temp. Talb. 217; *Brooks v. Reynolds*, 1 Bro. C. C. 183, and Mr. Belt's note; *Clarke v. Earl of Ormonde*, Jac. 122; *In re Roberts*, *Fowler v. Roberts*, 2 Giff. 226; *Marriage v. Skiggs*, 4 De G. & J. 4.

(*b*) *Whitaker v. Wright*, 2 Hare 310.

(*c*) *Gilpin v. Lady Southampton*, 18 Ves. 469; *Clarke v. Earl of Ormonde*, Jac. 122; *Lee v. Park*, 1 Keen 714; *Mitford*, Plead. by Jeremy 311.

(*d*) *Brooks v. Reynolds*, 1 Bro. C. C. 183; *Perry v. Phelps*, 10 Ves. 38; *Jackson v. Leap*, 1 J. & W. 231 and note.

reach the entire merits, or dispose of the entire merits. This was necessarily the case where there were equitable assets as well as legal assets, and, also, where the assets were required to be marshalled, in order to a full and perfect administration of the estate, and to prevent any creditor, legatee, or distributee from being deprived of his own proper benefit, by reason of any prior claims which might obstruct it.

§ 551. And, first, in relation to equitable assets. That portion only of the assets of the deceased party are deemed legal assets which by law are directly liable, in the hands of his executor or administrator, to the payment of debts and legacies. It is not within the design of these Commentaries to enter into a minute examination of what are deemed legal assets. But, generally speaking, they may be defined as assets which come into the hands and power of an executor or administrator, or such as he is entrusted with by law, *virtute officii*, to dispose of in the course of administration. In other words, whatever an executor or administrator takes *qua* executor or administrator, or in respect to his office, or which he can recover in any court of equity as well as of law, is to be considered as legal assets (*e*).

§ 552. Equitable assets are, on the other hand, all assets which are chargeable with the payment of debts or legacies in equity; and which do not fall under the description of legal assets. They are called equitable assets, because the creditor of the deceased could formerly only obtain payment out of them, by the aid and instrumentality of a court of equity (*f*). They are also called equitable for another reason; and that is, that the rules of distribution by which they are governed are different from those of the distribution of legal assets (*g*). In general, it may be said, that equitable assets are of two kinds; the first is, where assets are created such by the intent of the party; the second is, where they result from the nature of the estate made chargeable. Thus, for instance, if a testator devises land to trustees, to sell for the payment of debts, the assets resulting from the execution of the trust, are equitable assets upon the plain intent of the testator, notwithstanding the trustees are also made his executors, for, by directing the sale to be for the payment of debts generally, he excludes all preferences, and the property would not before the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104), otherwise have been liable to the payment of simple contract debts (*h*). The same principle applies, if the testator merely charges his lands

(*e*) *Cook v. Gregson*, 3 Drew. 547; *Christy v. Courtenay*, 26 Beav. 140; *Att.-Gen. v. Brunning*, 8 H. L. C. 258.

(*f*) *In re Power, Acworth v. Storie* [1901], 2 Ch. 665.

(*g*) *Talbot v. Frere*, 8 Ch. D. 568; *Walters v. Walters*, 18 Ch. D. 182.

(*h*) *Newton v. Bennet*, 1 Bro. C. C. 135; *Silk v. Prime*, 1 Bro. C. C. 138, note; *Clay v. Willis*, 1 B. & C. 364; *Barker v. May*, 9 B. & C. 489; *Bain v. Sadler*, L. R. 12 Eq. 570.

with the payment of his debts (i). On the other hand, if the estate be of an equitable nature, and be chargeable with debts, the fund is to be deemed equitable assets, unless by some statute it is expressly made legal assets; for it cannot be reached except through the instrumentality of a court of equity. And it may be laid down as a general principle, that everything is considered as equitable assets, which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to the payment of his debts generally (k).

§ 553. In the course of the administration of assets, courts of equity followed the same rules in regard to legal assets, which were formerly adopted by courts of law; and gave the same priority to the different classes of creditors, which was enjoyed at law; thus maintaining a practical exposition of the maxim, *Æquitas sequitur legem* (l). In the like manner, courts of equity recognized and enforced all antecedent liens, claims, and charges *in rem*, existing upon the property according to their priorities; whether these charges were of a legal or of an equitable nature, and whether the assets were legal or equitable (m). One of these priorities was that enjoyed by specialty creditors over creditors by simple contract which was abolished as from January 1, 1870, by the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), sometimes still called *Hinde Palmer's Act*. This statute expressly preserves the full force of any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt.

§ 554. But in regard to equitable assets (subject to the exception already stated), courts of equity, in the actual administration of them, adopted very different rules from those formerly adopted in courts of law in the administration of legal assets. Thus, in equity, it was and is a general rule that equitable assets shall be distributed equally, and *pari passu*, among all the creditors, without any reference to the priority or dignity of the debts; for courts of equity regard all debts in conscience as equal *jure naturali*, and equally entitled to be paid; and here they follow their own favourite maxim that equality is equity; *Æquitas est quasi æqualitas*. And if the fund falls short, all the creditors are required to abate in proportion (n).

§ 554a. The rules which the Court of Chancery applied in the administration of estates were part of the *lex fori*, and priorities were determined according to the English law, and not according to that

(i) *Silk v. Prime*, 1 Bro. C. C. 138 n.; *Price v. North*, 1 Ph. 85.

(k) *Silk v. Prime*, 1 Bro. C. C. 138 n.

(l) *Att.-Gen. v. Brunning*, 8 H. L. C. 258; *Morrice v. Bank of England*, Cas. temp. Talb. 220, 221.

(m) *Freemoult v. Dedire*, 1 P. Wms. 429; *Pope v. Gwinn*, 8 Ves. 28, note.

(n) *Creditors of Sir Charles Cox*, 3 P. Wms. 343; *In re Poole, Thompson v. Bennet*, 6 Ch. D. 739.

of the law of the country where an obligation was incurred (o), but the court gave full effect to charges upon property created by a contract entered into outside its jurisdiction (p). A secured creditor formerly possessed the right of realizing his security, and proving for the whole debt in competition with the unsecured creditors, not receiving in the result more than 20s. in the £1. In the case of an insolvent estate this worked what was deemed a serious injustice to the unsecured creditors, and has been altered by the introduction of the bankruptcy rule by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 10. The secured creditor where the estate is insolvent must now adopt one of four courses, (1) rely entirely on his security; or (2) realize his security and prove for the balance; or (3) value his security and prove for the balance; or (4) surrender his security and prove for the whole debt. If he adopts courses (1) or (3) his security may be redeemed at the face value or the assessed value as the case may be, and in the latter event subject to the right of the creditor to amend his valuation in the event of a clear mistake or a change of circumstances, unless he has accepted payment (q).

§ 555. It frequently happens, also, that lands and other property, not strictly legal assets, are charged, not only with the payment of debts, but also with the payment of legacies. In that case, all the legatees take *pari passu*; and if the equitable assets (after payment of the debts) are not sufficient to pay all the legacies, the legatees are all required to abate in proportion, unless some priority is specially given by the testator to particular legatees; for, *prima facie*, the testator must be presumed to have considered that he had assets sufficient to answer all the legacies and to intend that all his legacies shall be equally paid (r). But suppose the case to be, that the equitable assets are sufficient to pay all the debts; but, after such payment not sufficient to pay any of the legacies; and the property is charged with the payment of both debts and legacies. In such a conflict of rights, the question must arise, whether the creditors and legatees are to share in proportion, *pari passu*; or the creditors are to enjoy a priority of satisfaction out of the equitable assets. This was formerly a matter of no inconsiderable doubt; and it was contended with much apparent strength of reasoning that, as both creditors and legatees, in such a case, take out of the fund by the bounty of the testator, and not of strict right, they ought to share in proportion, *pari passu*. After some struggle in the courts of equity upon this point, it was at

(o) *Pardo v. Bingham*, L. R. 6 Eq. 485.

(p) *In re de Nicols, de Nicols v. Curlier*, [1900] 2 Ch. 410. See *Lashley v. Hog*, 2 Coop. t. Cott, 449.

(q) See *Exp. Drake, In re Ware*, 5 Ch. D. 866; *Couldery v. Bartrum*, 19 Ch. D. 394; *Exp. Norris, In re Sadler*, 17 Q. B. D. 728; *Exp. Nat. Prov. Bk. of England, In re Newton* [1896] 2 Q. B. 403.

(r) *Beeston v. Booth*, 4 Mad. 161; *Thwaites v. Foreman*, 1 Coll. 409; *affd.* 10 Jur. 483; *In re Harris, Harris v. Harris*, [1912] 2 Ch. 241.

length settled that, although as between themselves, in regard to equitable assets, the creditors are all equal, and are to share in proportion, *pari passu*; yet, as between them and legatees, the creditors are entitled to a priority and preference; and that legatees can take nothing until the debts are all paid (*s*).

§ 556. The ground of this decision was, that it is the duty of every man to be just before he is generous; and no one can well doubt the moral obligation of any man to provide for the payment of all his debts. The presumption, therefore, in the absence of all other words, showing a different intent (which intent would, however, no longer prevail), was, and is, that a testator means to provide first, for the discharge of his moral duties, and next, for the objects of his bounty, and not to confound the one with the other. For, otherwise, the testator would, in truth, and *in foro conscientiæ*, be disposing of another's property, and not making gifts *ultra æs alienum*. The good sense of this latter reasoning can scarcely escape observation. It proceeds upon the just and benignant interpretation of the intention of the party to fulfil his moral obligations in the just order which natural law would assign to them.

§ 557. In cases where the assets were partly legal, and partly equitable, courts of equity would not interfere to take away the legal preference of any creditors to the legal assets. But, if any creditor had been partly paid out of the legal assets by insisting on his preference, and he sought satisfaction of the residue of his debt out of the equitable assets, he would be postponed, till all the other creditors, not possessing such a preference, had received out of such equitable assets an equal proportion of their respective debts (*t*). This doctrine is founded upon and flows from that which we have been already considering, that in natural justice and conscience all debts are equal; that the debtor himself is equally bound to satisfy them all; and that equality is equity. When, therefore, a court of equity was called upon to assist a creditor, it had a right to insist, before relief was granted, that he who seeks equity shall do equity; that he should not make use of the law in his own favour to exclude equity; and at the same time insist that equity should aid the defects of the law, to the injury of equally meritorious claimants. The usual decree in cases of this sort was, that the creditor who had exhausted (or should exhaust) any part of the testator's estate in satisfaction of his debts, should not come upon or receive any further satisfaction out of the residue of the testator's estate (or the equitable assets) until the other creditors should thereout be made up equal with him (*u*). This is sometimes called marshalling the assets; but that appellation more

(*s*) *Walker v. Meager*, 2 P. Wms. 550; *Kidney v. Coussmaker*, 12 Ves. 136.

(*t*) *Chapman v. Esqar*, 1 Sm. & G. 575; *Bain v. Sadler*, L. R. 12 Eq. 570.

(*u*) See *Aldrich v. Cooper*, 8 Ves. 382.

appropriately belongs (as we shall immediately see) to another mode of equitable interference. The present is rather an exercise of equitable jurisdiction in refusing relief, unless upon the terms of doing equity.

§ 558. In the next place, as to marshalling assets (strictly so called) in the course of the administration (x). In the sense of the lexicographers, to marshal, is to arrange or rank in order; and in this sense, the marshalling of assets would be, to arrange or rank assets in the due order of administration. This primary sense of the language has been transferred into the vocabulary of courts of equity; and has there received a somewhat peculiar and technical sense, although still germane to its original signification. In the sense of the courts of equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties, having equities thereon, to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction, out of a portion of these funds. Thus, where there exist two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund for satisfaction, but the others can come upon one only; there, courts of equity exercise the authority to marshal (as it is called) the funds, and by this means enable the parties whose remedy at law is confined to one fund only, to receive due satisfaction (y). The general principle upon which courts of equity interfere in these cases is, that, without such interference, he who had a title to the double fund would possess an unreasonable power of defeating the claimants upon either fund, by taking his satisfaction out of the other, to the exclusion of them. So that, in fact, it would be entirely in his election, whether they should receive any satisfaction or not. Now, courts of equity treat such an exercise of power as wholly unjust and unconscientious; and therefore will interfere, not, indeed, to modify or absolutely to destroy the power, but to prevent it from being made an instrument of caprice, injustice, or imposition. Equity, it affording redress in such cases, does little more than apply the maxim, *Nemo ex alterius detrimento fieri debet locupletior* (z).

§ 559. And this principle is by no means confined to the administration of assets; but it is applied to a vast variety of other cases (as we shall hereafter see); as, for instance, to cases of two mortgages where one covers two estates, and the other but one; to cases of extents by the Crown; and, indeed, to cases of double securities generally (a). It may be laid down as the general rule of the courts of equity in cases of this sort, that, if a creditor has two funds, and in the exercise of

(x) *Post*, §§ 633 to 643.

(y) *Aldrich v. Cooper*, 8 Ves. 382; *In re Cornwall*, 3 Dru. & War. 173.

(z) See *Mills v. Eden*, 10 Mod. 499; *ante*, §§ 327, 499; *post*, §§ 633 to 642.

(a) *Aldrich v. Cooper*, 8 Ves. 382; *In re Cornwall*, 3 Dru. & War. 173.

his undoubted right pursues his remedy against one or other of his securities, a creditor with a security over one of the funds shall be compensated to the extent to which he has been disappointed by the election of the other creditor (*b*). The rule has been extended to the case of other persons standing in a similar predicament. Where a person mortgages two properties to secure one and the same sum of money, and afterwards devises them to different beneficiaries, the charges are apportioned upon the properties according to their respective values, and the beneficiary who pays more than the apportioned part may recover the excess from the other beneficiary, unless it clearly appear that the parties have agreed that the properties shall stand security in specific order (*c*). So where an agent mortgaged property of his principal for his personal debt in excess of his authority, and the mortgagee enforced his right to repayment against the principal's property, the principal was held entitled to enforce against the property of the agent liberated by this act of the mortgagee so much of the sum advanced by the mortgagee as exceeded that which the agent was authorized to raise (*d*). The rule is applicable whether the properties mortgaged be land (*e*), or personalty (*f*), or partly one and partly the other (*g*).

§ 560. But, although the rule is so general, yet it is not to be understood without some qualifications. It is never applied except where it can be done without injustice to the creditor, or other party in interest, having a title to the double fund, and also without injustice to the common debtor (*h*). Nor is it applied in favour of persons who are not common creditors of the same common debtor, except upon some special equity. Thus, a creditor of A. has no right, unless some peculiar equity intervenes, to insist that a creditor of A. and B. shall proceed against B.'s estate alone for the satisfaction of his debt, so that he may thereby receive a greater dividend from A.'s estate (*i*). So, where a creditor is a creditor upon two estates for the same debt, he will be entitled to receive dividends to the full amount from both estates, until he has been fully satisfied for his debt; for his title in such a case is not to be made to yield in favour of either estate, or the creditors of either to his own prejudice (*k*). It has, indeed, been said by Lord Hardwicke, that courts of equity have no right to marshal

(*b*) *Clifton v. Burt*, 1 P. Wms. 678 and Mr. Cox's note.

(*c*) *Aldrich v. Cooper*, 8 Ves. 382; *Johnson v. Child*, 4 Hare, 87; *In re Athill*, *Athill v. Athill*, 16 Ch. D. 211.

(*d*) *Ex parte Skyrme*, *In re Burge*, *Woodall & Co.* [1912] 1 K. B. 393.

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(*g*) *In re Cornwall*, 3 Dru. & War. 173; *Johnson v. Child*, 4 Hare, 87.

(*h*) *Barnes v. Rackster*, 1 Y. & C. Ch. 401; *Earl of Clarendon v. Barham*, 1 Y. & C. Ch. 688; *Flint v. Howard* [1893] 2 Ch. 54.

(*i*) *Ex parte Kendall*, 17 Ves. 514; *post*, §§ 642 to 645.

(*k*) *Bonser v. Cox*, 6 Beav. 84.

the assets of a person who is alive, but only the real and personal assets of a person deceased; for the assets are not subject to the jurisdiction of equity until his death (l). But this language is to be understood with reference to the case in which it was spoken; for there is no doubt that there may be a marshalling of the real and personal assets of living persons under particular circumstances, where peculiar equities attach upon the one or the other; although such cases are very rare (m).

§ 561. The rule of courts of equity, in marshalling assets in the course of administration, is, that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of their respective claims, be applied in satisfaction thereof (n). The rule must necessarily, in its application to the actual circumstances of different cases, admit, nay, must require, very different modifications of relief. It may be illustrated by the suggestion of a few cases, which present its application in a clear view, and show the limitations belonging to it.

§ 562. In the first place, before the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104), if a specialty creditor received satisfaction out of the personal assets of the deceased, a simple contract creditor (who had before the statute no claim except upon the personal assets) in equity stood in the place of the specialty creditor against the real assets, so far as the latter had exhausted the personal assets in payment of his debts, and no farther. But the court would not, in cases of this sort, extend the relief to creditors farther than the nature of the contract would justify it. Therefore it must have been a specialty creditor of the person whose assets were in question; such a one as might have had a remedy against both the real and personal estate of the deceased debtor, or against either of them. For it was not every specialty creditor in whose place the simple contract creditors could come to affect the real assets. If the specialty creditor himself could not affect the real estate, as, if the heirs were not bound by the specialty; or if there were no personal covenant binding the party to pay; or if the creditors were not creditors of the same person, and had not any demand against both funds, as being the property of the same person; in these and the like cases, there was no ground for the interposition of courts of equity (o).

§ 563. On the other hand, if a specialty creditor, having a right to resort to two funds, had not as yet received satisfaction out of either,

(l) *Lacam v. Mertins*, 1 Ves. Sen. 312.

(m) See *Ex parte Kendall*, 17 Ves. 514; *Barnes v. Rackster*, 1 Y. & C. Ch. 401; *Earl of Clarendon v. Barham*, 1 Y. & C. Ch. 688; *Flint v. Howard* [1893] 2 Ch. 54; *Ex parte Skyrme, In re Burge Woodall & Co.* [1912] 1 K. B. 393.

(n) See *Clifton v. Burt*, 1 P. Will. 679, Mr. Cox's valuable note (1), from which I have freely drawn.

(o) *Clifton v. Burt*, 1 P. Will. 679, Cox's note (1); *Aldrich v. Cooper*, 8 Ves. 382; *Ex parte Kendall*, 17 Ves. 514.

a court of equity would not interfere, either to throw him for satisfaction upon the fund which could be effected by him only, to the intent that the other fund should be clear for him who can have access to the latter only; or put the creditor to his election between the one fund and the other. There are, indeed, many cases in which it has been said that a doubly secured creditor is "thrown on" a particular security in exoneration or relief of another, but it would be contrary to all equitable principles to interfere with a party claiming for value in the exercise of his proprietary rights. According to the true principle, if the creditor resorted to the fund, upon which alone the other party had any security, it would decree satisfaction *pro tanto* to the latter out of the other fund (*p*). The usual decree in such cases was, that "in case any of the specialty creditors should exhaust any part of the personal estate, then the simple contract creditors were to stand in their place, and receive a satisfaction *pro tanto* out of" the real assets (*q*).

§ 564. The same principle applied to the case of a mortgagee, who exhausted the personal estate in the payment of his debt. In such a case the simple contract creditors were allowed to stand in the place of the mortgagee, in regard to the real estate bound by the mortgage (*r*). And, where the personal assets had been so applied in discharge of a mortgage, the simple contract creditors might, in furtherance of the same principle, have compelled the heir to refund so much of the personal assets as had been applied to pay off the mortgage (*s*).

§ 564*a*. It was formerly doubted whether the same principle applied to the case of a vendor of an estate, whose unpaid purchase-money was, after the death of the purchaser, paid out of his personal estate. But it was afterwards settled that, in such a case, the simple contract creditors of the purchaser should stand in the place of the vendor, with respect to his lien on the estate so sold, against the devisee, as well as against the heir of the same estate (*t*). But by force of the Real Estate Charges Act, 1867 (30 & 31 Vict. c. 69), this illustration can no longer arise in practice, as the heir or devisee would have to refund the balance so paid in any event.

§ 565. In general, legatees were entitled to the same equities where the personal estate was exhausted by specialty creditors; for they would otherwise have been without any means of receiving the bounty of the testator (*u*). So they were permitted, in like manner, to stand in the place of the specialty creditors, against the real assets

(*p*) Hatherley, L.C.—*Dolphin v. Aylward*, L. R. 4 H. L. & J. 501.

(*q*) *Davies v. Topp*, 1 Bro. C. C. 526; *Aldrich v. Cooper*, 8 Ves. 382; *Sproule v. Prior*, 8 Sim. 189.

(*r*) *Aldrich v. Cooper*, 8 Ves. 382.

(*s*) *Wilson v. Fielding*, 2 Vern. 763.

(*t*) *Selby v. Selby*, 4 Russ. 336.

(*u*) *Tipping v. Tipping*, 1 P. Wms. 730; *Burton v. Pierpoint*, 2 P. Wms. 81.

descended to the heir (x). So they were permitted, in like manner, to stand in the place of a mortgagee, who had exhausted the personal estate in paying his mortgage. And their equity would prevail, not only in cases where the mortgaged premises had descended to the heir-at-law; but also where they had been devised to a devisee, who is to take subject to the mortgage (y). But their equity will not prevail against a devisee of the real estate not mortgaged, whether he be a specific or a residuary devisee, residuary devises being now specific by force of the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106); for he also took by the bounty of the testator; and between persons, equally taking by the bounty of the testator, equity would not interfere, unless the testator had clearly shown some ground of preference or priority of the one over the other (z). So that there was a distinction between the case where the estate was devised, and there were specialty creditors, and the case where it was devised, and there was a mortgage on it. In the latter case, the legatees stood in the place of the mortgagee, if he exhausted the personal assets; in the former case, they did not stand in the place of the specialty creditors. The reason assigned is, that a specialty debt is no lien on land in the hands of the obligor, or his heir or devisee. But a mortgage is a lien, and an estate in the land. By a devise of land mortgaged, nothing passes but the equity of redemption, if it is a mortgage in fee; if it is for years, the reversion and equity of redemption pass.

§ 566. In like manner, where lands are subjected to the payment of all debts, legatees are permitted to stand, in regard to such lands, in the place of simple contract creditors, who have come upon the personal estate, and exhausted it so far as to prevent a satisfaction of their legacies (a). So, where legacies given by a will are charged on real estate, but legacies by codicil are not; the former legatees will be compelled to resort to real assets, if there is a deficiency of the assets to satisfy both (b).

§ 566a. Upon analogous grounds, if the subject-matter of a specific legacy is pledged, mortgaged or otherwise incumbered by the testator, the specific legatee is entitled to have the property redeemed by the executor, out of the general assets of the testator, unless the incumbrance exceed the value of the property, in which event his right is limited to that value (c).

(x) *Clifton v. Burt*, 1 P. Wms. 678, and Cox's note; *Fenhoulet v. Passavant*, 1 Dick. 253.

(y) *Lutkins v. Leigh*, Cas. temp. Talb. 53; *Forrester v. Leigh*, Ambler, 171; *Lomas v. Wright*, 2 M. & K. 769; *Porcher v. Wilson*, 14 W. R. 1011; *Lord Lilford v. Powys-Keck*, 35 Beav. 77.

(z) *Clifton v. Burt*, 1 P. Wms. 678; and Cox's note; *Biederman v. Seymour*, 3 Beav. 368; *Mirehouse v. Scaife*, 2 M. & Cr. 695.

(a) *Paterson v. Scott*, 1 De G., M. & G. 531; *In re Salt, Brothwood v. Keeling* [1895] 2 Ch. 203.

(b) *Norman v. Morrill*, 4 Ves. 769.

(c) *Knight v. Davis*, 3 Myl. & K. 358; *Bothamley v. Sherson*, L. R. 20 Eq. 304.

§ 567. The doctrine adopted in all these cases, of allowing one creditor to stand in the place of another having two funds to resort to, and electing to take satisfaction out of one, to which alone another creditor can resort, was probably transferred from the civil law into equity jurisprudence. It is certainly founded in principles of natural justice; and it early worked its way, under the title of substitution, into the civil law, where it was applied in a very large and liberal manner. But upon this subject we shall have occasion to speak hereafter in another place (*d*).

§ 568. There were other cases in which the marshalling of assets was in like manner enforced in courts of equity; as, for instance, in favour of the widow of a person deceased. After the death of the husband, his creditors could not take his widow's necessary apparel in satisfaction of their debts (*e*). With this exception, a widow's paraphernalia were generally subject to the payment of the debts of her husband. But, in favour of the widow, and to preserve her paraphernalia, courts of equity will interfere, by turning creditors entitled to proceed against real assets or funds, over to these assets and funds for satisfaction. And if the paraphernalia have been actually taken by creditors in satisfaction of their debts, the widow will be allowed to stand in their place, and the assets will be marshalled so as to give her a compensation *pro tanto* (*f*).

§ 569. So long as the Mortmain Act (9 Geo. 2, c. 36) was in force, legacies or bequests by will to charitable uses, payable out of real estate, or charged on real estate, or to arise from the sale of real estate, were utterly void. And courts of equity, following out the intent and object of the statute, refused to interfere in favour of legatees of personal property for charity, by marshalling assets for this purpose in any case whatever; as, by throwing the debts or legacies on real assets for payment; or, by allowing the charity legatees to stand in the place of any creditor or legatee who had exhausted the personal estate, against the real assets, but would give effect to an express direction of the testator that charitable legacies were to be paid out of pure personalty in priority to all other charges (*g*). Since the Mortmain and Charitable Uses Act, 1891, marshalling as applied to charities will be of little importance.

§ 570. Hitherto we have been speaking of marshalling assets in favour of creditors, legatees, or widows. But it is not to be understood that these are the only persons entitled to the benefit of this wholesome doctrine of courts of equity. Heirs-at-law and devisees

(*d*) *Post*, § 635, 636, 637.

(*e*) Black. Comm. 436; Noy's Maxims, ch. 49; *Townshend v. Windham*, 2 Ves. 7.

(*f*) *Ram on Assets*, ch. 18, pp. 353, 354, and the cases there cited; *Aldrich v. Cooper*, 8 Ves. 397. See *Masson Templier & Co. v. De Fries* [1909] 2 K. B. 831.

(*g*) *Philanthropic Soc. v. Kemp*, 4 Beav. 581; *Robinson v. Geldard*, 3 Mac. & G. 735; *Baumont v. Olivera*, L. R. 4 Ch. 309; *Miles v. Harrison*, L. R. 9 Ch. 316.

are, in a great variety of cases, entitled to the protection resulting from the just application of this equitable remedy. Thus, for instance, if an heir or devisee of real estate is sued by a bond-creditor, he may, in many cases, be entitled to stand in the place of such specialty creditor against the personal estate of the deceased testator or intestate (*h*).

§ 571. In order more fully to comprehend the nature and limitations of this doctrine, it is necessary to state that, in the view of courts of equity, the personal estate of the deceased constitutes the primary and natural fund for the payment of his debts; and they will direct it to be applied in the first instance to that purpose, unless from the will of the deceased, or from some other controlling equities, it is clear that it ought not to be so applied (*i*). But, in the order of satisfaction out of the personal estate of the deceased, if it is not sufficient for all purposes, creditors are preferred to legatees; specific legatees are preferred to the heir and devisee of the real estate, charged with specialties or with the payment of debts (*k*); the devisee of mortgaged premises is preferred to the heir-at-law of descended estates (*l*); and *a fortiori* the devisee of premises not mortgaged is preferred to the heir-at-law (*m*). The natural inference is that the testator intended effect to be given to all his specific gifts, and specific legatees and specific devisees contribute rateably in proportion to the respective values of the subject-matter to make good to creditors any deficiency in the assets (*n*). Where the equities of the legatees and devisees are equal, which (as we have seen) is sometimes the case, courts of equity remain neutral, and silently suffer the law to prevail (*o*). But where the personal assets are sufficient to pay all the debts and legacies and other charges, there the heir or devisee, who has been compelled to pay a debt or an incumbrance of his ancestor or testator, binding upon him, is entitled (unless there be some other equity which repels the claim) to have the debt paid out of the personal assets in preference to the residuary legatees or distributees. Thus, for instance, if a specialty debt or mortgage of an ancestor or testator is paid by the heir or devisee, he is entitled to have it paid out of the personal assets in the hands of the executor,

(*h*) *Mogg v. Hodges*, 2 Ves. Sen. 52; *Galton v. Hancock*, 2 Atk. 424, 425.

(*i*) See Co. Litt. 208 *b*, Butler's note (106).

(*k*) *Cope v. Cope*, 2 Salk. 449.

(*l*) Toller on Executors, B. 3, ch. 8, p. 418; *Howell v. Price*, 1 P. Will. 294, Mr. Cox's note; *Cope v. Cope*, 2 Salk. 449, Mr. Evans's note.

(*m*) *Chaplin v. Chaplin*, 3 P. Will. 364; *Davies v. Topp*, 1 Bro. C. C. 524; *Manning v. Spooner*, 3 Ves. 114.

(*n*) *Tombs v. Roch*, 2 Coll. 490; *Hensman v. Fryer*, L. R. 3 Ch. 420; *Lancefield v. Iggulden*, L. R. 10 Ch. 136.

(*o*) The whole subject was largely discussed in *Davies v. Topp*, 1 Bro. C. C. 524, and in Mr. Cox's note to *Howell v. Price*, 1 P. Will. 294; and *Evelyn v. Evelyn*, 2 P. Will. 664; *Bootle v. Blundell*, 1 Meriv. 215 to 238; Ram on Assets, ch. 28. §§ 1 to 4, ch. 29, §§ 1 to 4.

unless the testator, by express words or other manifest intention, has clearly exempted the personal assets from the payment (*p*). In considering these cases the student must remember the change introduced by the Real Estates Charges Act, 1854, 1867, and 1877 (17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34), which cast upon the successor to real estate the burden of charges existing thereon, unless the ancestor or testator has made express provision to the contrary. But this would not affect the right of the mortgagee to pursue his remedies which are left unaffected by the statutes, and accordingly the principles of marshalling acquire a new importance for the purpose of adjusting the burden according to its true incidence.

§ 572. What constitutes proof of an intended exemption by the testator is not, in many cases, ascertainable upon abstract principles, but depends upon circumstances (*q*). It is certain, however, that a devise of all the testator's real estate, subject to the payment of his debts, or a devise of a particular estate, subject to the payment of debts, is not alone sufficient to exempt the personal estate (*r*). But, on the other hand, if the real estate is directed to be sold for the payment of debts, and the personal estate is expressly bequeathed to legatees, there the personal estate will, by necessary implication, be exempted (*s*).

§ 573. The doctrine of the court, in all cases of this sort, is supposed to be founded upon the same principle; that is, to follow out the intention of the testator. The personal estate is deemed the natural and primary fund for the payment of all debts; and the testator is presumed to act upon this legal doctrine until he shows some other distinct and unequivocal intention. The general rule, therefore, of courts of equity, although sometimes delivered in one form and sometimes in another, is (as Lord Hardwicke has expressed it) that the personal estate shall be first applied to the payment of debts, unless there be express words, or a plain intention of the testator to exempt his personal estate, or to give his personal estate as a *specific* legacy; for he may do this, as well as give the bulk of his real estate by way of specific legacy (*t*).

§ 574. But, although the personal estate is thus decreed the general and primary fund for the payment of debts, and still remains so, notwithstanding the real estate is also collaterally chargeable; yet the rule was otherwise, or rather was differently applied, where the

(*p*) *Howell v. Price*, 1 P. Will. 291, 294, and Cox's note (1); *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Tower v. Lord Rous*, 18 Ves. 132.

(*q*) *Bootle v. Blundell*, 1 Mer. 193.

(*r*) *Ouseley v. Anstruther*, 10 Beav. 453; *Whieldon v. Spode*, 15 Beav. 537; *Wells v. Row*, 48 L. J. Ch. 476.

(*s*) *Plenty v. West*, 16 Beav. 173; *Gilbertson v. Gilbertson*, 34 Beav. 354.

(*t*) *Walker v. Jackson*, 2 Atk. 625; *ante*, § 556; *Powell v. Riley*, 12 Eq. 175.

charge of the debt was principally and primarily upon the real estate, and the personal security of covenant was only collateral; for the primary fund ought in conscience, in all cases, to exonerate the auxiliary fund (*u*). Having regard to the statutes next to be noticed, it seems unnecessary to preserve the discussion of this topic by the learned author.

§ 574a. The law as to the primary liability of the general personal estate to pay mortgages and other charges on lands devised or descended has been entirely altered by the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), and amending Acts. This Act enacted that, "when any person shall, after the passing of this Act, die seised of or entitled to any interest in any land or other hereditaments, which shall, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will, deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such lands or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the lands or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof." And the words "have signified any contrary or other intention" have been defined by the Real Estates Charges Act, 1867 (30 & 31 Vict. c. 69), "in the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts or all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of his intention contrary to or other than the rule established by the last-mentioned Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debt or debts charged by way of mortgage on any part of his real estate." By the same Act the word "mortgage" in the principal Act was extended to include the vendor's lien for unpaid purchase-money if the vendor left the land by will. By a further amending Act, the Real Estates Charges Act, 1877 (40 & 41 Vict. c. 34), the vendor's lien on lands purchased by an intestate was included, and the same Act also embraced leasehold interests within the scope of the Act. It has been said that the Act of 1877 must be regarded as a legislative declaration that the statutes are to receive

(*u*) See Co. Litt. 208 b, Butler's note (106); *Evelyn v. Evelyn*, 2 P. Will. 664, and Cox's note (1).

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(u) See Co. Litt. 208 b, Butler's note (106); *Evelyn v. Evelyn*, 2 P. Will. 664, and Cox's note (1).

sale or other transaction of an executor, attempting to bind the assets in his character of executor (*g*), so as to let in the claim of creditors and others who are principally interested, there must be some fraud, or collusion, or misconduct between the parties. A mere secret intention of the executor to misapply the funds unknown to the other party dealing with him, or a subsequent unconnected misapplication of them, will not affect the purchaser. He must be conscious of such intention, and designedly aid or assist in its execution (*h*). But in the view of courts of equity, there is a broad distinction between cases of a sale or pledge of the testator's assets for a present advance and cases of such a sale or pledge for an antecedent debt of the executor; for, in the latter case, the parties must be generally understood to co-operate in a misapplication of the assets from their proper purpose, unless that inference is repelled by the circumstances (*i*).

§ 581. The general doctrine now maintained by courts of equity upon this subject, cannot be better summed up than it is by a learned judge (Sir John Leach) in an important case. "Every person" (said he) "who acquires personal assets by a breach of trust or a *devastavit* by the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving, as a pledge for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will or otherwise; because this sale or pledge is held to be *primâ facie* consistent with the duties of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledge is *primâ facie* inconsistent with the duty of an executor. I preface both of these propositions with the term 'generally speaking,' because they both seem to admit of exceptions" (*k*). And it may be added, that, whenever there is a misapplication of the personal assets, and the assets or their proceeds can be traced into the hands of any persons affected with notice of such misapplication, there the trust will attach upon the property or proceeds in the hands of such persons, whatever may have been the extent of such misapplication or conversion (*l*). The personal repre-

(*g*) *Hill v. Simpson*, 7 Ves. 152, *In re Cooper, Cooper v. Vesey*, 20 Ch. D. 611; *Attenborough v. Solomon* [1913] A. C. 76.

(*h*) *Hill v. Simpson*, 7 Ves. 152; *McLeod v. Drummond*, 14 Ves. 355, 17 Ves. 152; *Walker v. Taylor*, 8 Jur. N. S. 681.

(*i*) *Hill v. Simpson*, 7 Ves. 152. See Mr. Roscoe's learned note to *Whale v. Booth*, 4 Doug. 47, note (66).

(*k*) *Keane v. Robarts*, 4 Mad. 357, 358.

(*l*) *Adair v. Shaw*, 1 Sch. & Lefr. 261, 262. The same principle may be further illustrated by the cases already mentioned, where creditors and others are permitted to sue the debtors of the deceased, when they collude with the executor or administra-

sentative can only effectively dispose of specific items of the estate. He cannot create a general charge upon the estate for moneys paid to him, even where they are ostensibly borrowed for the purposes of the estate (*m*).

§ 582. In cases where, during coverture, the assets of a *feme covert* executrix were wasted by the husband, and he then died, no action at law lay by the creditors against the assets of the husband. But courts of equity did, in such a case, interfere, and relieve the creditors upon the ground of the breach of trust in the husband, by his wrongful conversion of the assets of the wife's testator (*n*). The equitable rule now prevails by force of the Judicature Act, 1873, s. 25, sub-s. 11.

§ 583. And here we might treat of the nature and extent of the jurisdiction which courts of equity will exercise in regard to the assets of foreigners, collected under what is called an ancillary administration (because it is subordinate to the original administration), taken out in the country where the assets are locally situate. This subject, however, has been largely discussed in another place, in considering the conflict of the laws of different countries upon the subject of administrations of property situate therein, and, therefore, it will be but very briefly taken notice of here (*o*). In general, it may be said that, where a domestic executor or administrator collects assets of the deceased in a foreign country, without any letters of administration taken out, or any actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets of the deceased, to be administered here under the domestic administration (*p*). And where such assets have been collected abroad, under a foreign administration, and such administration is still open, the executor or administrator can be called upon to account for such assets under the domestic administration (*q*), but regard is generally paid to the law peculiar to the foreign country (*r*). And, indeed, in many instances probates of wills and letters of administration are not granted in any country in respect to assets generally, but only in respect to such assets as are within the jurisdiction of the country by which the probate is established or the administration granted. In a modern decision which contains an elaborate review of previous decisions, the law was laid down as follows:—The personal assets (not including leaseholds) of a person

tor, although they are not suable except by the executor or administrator. See *ante*, §§ 422 to 424.

(*m*) *Farhall v. Farhall*, L. R. 7 Ch. 123.

(*n*) *Adair v. Shaw*, 1 Sch. & Lefr. 261, 262, 263.

(*o*) See Story, Comm. on Conflict of Laws, ch. 13, § 492 to 530.

(*p*) *Dowdale's Case*, 6 Co. 46^b, *Att.-Gen. v. Dimond*, 1 Cr. & Jerv. 370.

(*q*) *Ewing v. Orr-Ewing*, 9 App. Cas. 34; *Ewing v. Orr-Ewing*, 10 App. Cas. 453.

(*r*) *Waterhouse v. Stansfield*, 9 Hare, 234, 10 Hare, 254; *Cook v. Gregson*, 2 Drew. 286; *Harrison v. Harrison*, L. R. 8 Ch. 342.

having a foreign domicile are governed for the purpose of legal representation, of collection and of administration as distinguished from distribution, by the *lex loci rei sitæ*; for the purposes of succession and enjoyment they are governed by the *lex domicilii* (s). Land including leaseholds can only be administered by the *lex loci rei sitæ* (t).

(s) *Blackwood v. Reg.*, 8 App. Cas. 82. See also *Macdonald v. Macdonald*, L. R. 14 Eq. 60.

(t) *Birtwhistle v. Vardill*, 2 Cl. & F. 571; 7 Cl. & F. 895; *Harrison v. Harrison*, L. R. 8 Ch. 342; *Freke v. Lord Carberry*, L. R. 16 Eq. 461; *Duncan v. Lawson*, 41

CHAPTER X.

LEGACIES.

§ 590. ANOTHER head of the original concurrent jurisdiction in equity is in regard to LEGACIES. This subject has been in part incidentally treated before; but it is proper to bring the subject more fully under review. It seems that, originally, the jurisdiction over personal legacies was claimed and exercised in the temporal courts of common law; or, at least, that it was a jurisdiction *mixti fori*, claimed and exercised in the county court, where the bishop and sheriff sat together (*a*). Afterwards (at least from the reign of Henry III.), the spiritual or ecclesiastical courts obtained exclusive jurisdiction over the probate of wills of personal property; and, as incident thereto, they acquired jurisdiction (though not exclusive) over legacies (*b*). This latter jurisdiction continued in the ecclesiastical courts until their jurisdiction over suits for legacies was taken away by the Court of Probate Act, 1857, s. 23, which provided that, no suits for legacies or suits for the distribution of legacies should be entertained by the then newly created court, or by any court or person whose jurisdiction as to matters and causes testamentary was thereby abolished. The suits for legacies and distribution of residues are therefore left entirely to the Court of Chancery, now the Chancery Division of the High Court.

§ 591. In regard to legacies, it was finally settled after some conflict of authority, that no action would lie at the common law to recover the amount of a pecuniary legacy, but that the remedy was exclusively in the courts of equity (*c*). But in cases of specific legacies of goods and chattels, after the executor has assented thereto, the property vested immediately in the legatee, who might maintain an action at law for the recovery thereof (*d*). And there are decisions which establish that an executor might be made liable, upon an

(*a*) Swinb. on Wills, Pt. 6, § 11, pp. 430, 431, 432; 2 Black, Comm. 491, 492; 3 id. 61, 95, 96; *Marriott v. Marriott*, 1 Str. 667, 669, 670; 2 Roper on Legacies, by White, ch. 25, p. 685; 1 Reeves, Hist. of the Law, 92, 308.

(*b*) 3 Black. Comm. 98; Com. Dig. *Prohibition*, G. 17; Bac. Abr. *Legacies*, M.; *Atkins v. Hill*, Cowp. 287.

(*c*) *Deeks v. Strutt*, 5 T. R. 690.

(*d*) *Doe v. Guy*, 3 East 120.

admission of liability, for money had and received or upon an account stated in an action at law for the recovery thereof (e).

§ 592. The ground upon which the general jurisdiction of the common law courts was denied was the pernicious consequences which would follow from allowing such an action at law; for courts of law, if compellable to entertain the jurisdiction, could not impose any terms upon the parties. Thus, for instance, a suit might be maintained by a husband for a legacy given to his wife, without making any provision for her, or for her family; whereas, a court of equity would require such a provision to be made (f).

§ 593. But it is very certain, that courts of equity exercised a concurrent jurisdiction with all other courts in cases of legacies, whether the executor had assented thereto or not (g). The grounds of this jurisdiction are various. In the first place, the executor is treated as a trustee for the benefit of the legatees; and, therefore, as a matter of trust, legacies are within the cognizance of courts of equity, whether the executor has assented thereto or not. This seems a universal ground for the jurisdiction (h). In the next place, the jurisdiction is maintainable in all cases where an account of discovery or distribution of the assets is sought upon general principles. Indeed, Lord Mansfield seems to have thought that the jurisdiction arose as an incident to discovery and account (i). In the next place, there was, in many cases, the want of any adequate or complete remedy in any other court (k).

§ 594. Obvious as some of these grounds are to found a general jurisdiction in equity in cases of legacies, it does not appear that the jurisdiction was not ordinarily exercised originally. Lord Kenyon indeed has said, the jurisdiction over questions of legacies was not exercised in equity until the time of Lord Chancellor Nottingham (l). In this remark, Lord Kenyon was probably under some slight mistake; for traces are found of an exercise of the jurisdiction as early as the time of Lord Chancellor Ellesmere, in cases where the defendant answered the bill, and took no exceptions; although he appears to have entertained the opinion that the ecclesiastical courts were more proper to give relief in cases of legacies (m). But it is highly probable that the jurisdiction was not firmly established beyond controversy until Lord Nottingham's time.

(e) *Roper v. Holland*, 3 A. & E. 99; *Hart v. Minors*, 2 Cr. & M. 700; *Howard v. Brownhill*, 23 L. J. Q. B. 23.

(f) *Deeks v. Strutt*, 5 T. R. 692.

(g) *Franco v. Alvares*, 3 Atk. 346.

(h) *Roper on Legacies*, by White, ch. 25, p. 685; *Farrington v. Knightley*, 1 P. Will. 549, 554; *Wind v. Jekyll*, 1 P. Will. 575; *Hurst v. Beach*, 5 Mad. 360; *Attenborough v. Solomon*, 1913 A. C. 76.

(i) *Atkins v. Hill*, Cowp. 287, 2 Mad. Pr. Ch. 1, 2.

(k) 2 Mad. Pr. Ch. 1, 2, 3.

(l) *Deeks v. Strutt*, 5 T. R. 692.

(m) 2 Mad. Pr. Ch. 1, 2.

§ 595. Indeed, in many cases, courts of equity exercised an exclusive jurisdiction in regard to legacies; as, for instance, where the bequest of the legacy involved the execution of trusts, either express or implied; or where the trusts, engrafted on the bequest, were themselves to be pointed out by the court.

§ 602. In regard to legacies charged on land, courts of equity, for the reasons already stated, also exercised an exclusive jurisdiction. In deciding upon the validity and interpretation of purely personal legacies, courts of equity implicitly followed the rules of the civil law (*n*). But in legacies charged on land, they followed the rules of the common law, as to the validity and interpretation thereof (*o*).

§ 603. But the beneficial operation of the jurisdiction of courts of equity, in cases of legacies, is even more apparent in some other cases, where the remedies are peculiar to such courts, and are protective of the rights and interests of legatees. Thus, for instance, in cases of pecuniary legacies, due and payable at a future day, courts of equity will compel security to be given for the due payment thereof, even if the legacy be contingent (*p*). An annuity under a will being a legacy payable by instalments, an annuitant possesses a similar right (*q*). But if the annuity arises under an instrument antecedent to the will, it is a debt and other considerations apply (*r*).

§ 604. Another class of cases of the same nature is, where a specific legacy is given to one for life, and after his death to another; there the legatee in remainder was formerly entitled, in all cases, to come into a court of equity, and to have a decree for security from the tenant for life, for the due delivery over of the legacy to the remainderman. But the modern rule is, not to entertain such a bill, unless there be some allegation and proof of waste; or of danger of waste of the property. Without such ingredients, the remainderman is only entitled to have an inventory of the property bequeathed to him, so that he may be enabled to identify it; and, when his absolute right accrues, to enforce a due delivery of it (*s*).

§ 605. This may suffice, in this place, on the subject of the peculiar jurisdiction of courts of equity in cases of legacies, when the relief sought and given is of a precautionary and protective nature. The subject will again come under review in the consideration of bills *quia timet* (*t*).

(*n*) *Franco v. Alvares*, 3 Atk. 246; *Hurst v. Beach*, 5 Mad. 360; 2 Mad. Pr. Ch. 1, 2; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and note (*h*).

(*o*) *Reynish v. Martin*, 3 Atk. 333, 334; *Paschall v. Ketterich*, Dyer 151 (*b*), (5). But see Dyer, 264, *b*.

(*p*) *Webber v. Webber*, 1 Sim. & S. 311; *King v. Malcott*, 9 Hare, 692; *In re Hall*, *Foster v. Metcalfe*, [1903] 2 Ch. 226.

(*q*) *In re Parry*, *Scott v. Leake*, 42 Ch. D. 570.

(*r*) *In re Hargreaves*, *Dicks v. Hare*, 44 Ch. D. 236.

(*s*) *Leeke v. Bennett*, 1 Atk. 471; *Bill v. Kynaston*, 2 Atk. 82.

(*t*) *Post*, §§ 844, 845, 846.

§ 606. In regard to a donation *mortis causâ*, which is a sort of amphibious gift between a gift *inter vivos* and a legacy, it was not properly cognizable by the ecclesiastical courts; neither does it fall regularly within an administration; nor does it require any act of the executor to constitute a title in the donee (*u*). It is, properly, a gift of personal property (*x*), by a party who is in peril of death, upon condition, that it shall presently belong to the donee, in case the donor shall die, but not otherwise (*y*). A gift of title-deeds has been held to be effective donation *mortis causâ* of a mortgage security (*z*). But although a mortgage involves an interest in land, it is regarded in the eyes of a court of equity primarily as a debt, for the repayment of which the land stands as security (*a*). To give it effect, there must be a delivery of it by the donor; and this delivery may be antecedent to the gift (*b*), but whatever form it takes, whether actual or symbolical, it is essential to the validity of this form of gift (*c*). By an extension which may be traced historically, many subject matters which would be inadmissible for the purposes of gifts *inter vivos* by tradition, because they are not susceptible of manual delivery, are allowed to be proper subject matters of a donation *mortis causâ* by what has recently been defined as an inchoate or imperfect delivery (*d*). These gifts are held to be effective notwithstanding the provisions of the Wills Act, 1837 (*e*), and this introduces an anomalous state of things, for a person may establish his right to an unlimited amount by his own uncorroborated evidence (*f*), whereas if a testator puts pen to paper to make a gift of £5 or even less, the elaborate formalities of the Wills Act cannot be evaded.

§ 607. The notion of a donation *mortis causâ* was originally derived into the English law from the civil law. In that law it was thus defined: "Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is, qui accepit. Sin autem supervixisset is, qui donavit, reciperet; vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit" (*g*). It was a long time a question among the Roman

(*u*) Roper, Leg. by White, ch. 1, § 2, p. 2; *Thompson v. Hodgson*, 2 Str. 777; *Ward v. Turner*, 2 Ves. 431. (*x*) *Ward v. Turner*, 2 Ves. 439.

(*y*) *Tate v. Hilbert*, 2 Ves. Jun. 121; *Staniland v. Willott*, 3 Mac. & G. 664; *Cosnam v. Guise*, 15 Moo. P. C. 215; *Treasury Solicitor v. Lewis*, [1900] 2 Ch. 812.

(*z*) *Duffield v. Elwes*, 1 Bli. N. S. 497.

(*a*) *Thornborough v. Baker*, 3 Swanst. 628; *Holford v. Yate*, 1 K. & J. 677; *Campbell v. Holyland*, 7 Ch. D. 166.

(*b*) *Cain v. Moon*, [1896] 2 Q. B. 283.

(*c*) *Jones v. Selby*, Prec. Ch. 200; *Bunn v. Markham*, 7 Taunt. 224; *Mustapha v. Wedlake*, [1891] W. N. 201; *In re Johnson, Sandy v. Reilly*, 92 L. T. 357.

(*d*) *In re Wasserberg, Union of London & Smith's Bank v. Wasserberg*, [1915] 1 Ch. 195. The earliest case is the decision of the House of Lords in *Duffield v. Elwes*, 1 Bli. N. S. 497.

(*e*) *Moore v. Darton*, 4 De G. & Sm. 517.

(*f*) *In re Farman, Farman v. Smith*, 57 L. J. Ch. 637.

(*g*) Inst. Lib. 2, tit. 7, § 1.

lawyers, whether a donation *mortis causâ* ought to be reputed a gift or a legacy, inasmuch as it partakes of the nature of both (*et utriusque causæ quædam habebat insignia*); and Justinian finally settled, that it should be deemed of the nature of legacies: “*Hæ mortis causa Donationes ad exemplum legatorum redactæ sunt per omnia*” (*h*).

§ 607*a*. According to the civil law, a *donatio mortis causâ* may be made subject to a trust or condition. “*Eorum, quibus mortis causâ donatum est, fidei committi quoquo tempore potest; quod fidei commissum, hæredes, salva Falcidiæ ratione, quam in his quoque donationibus exemplo legatorum, locum habere placuit, præstabunt. Si pars donationis fidei commissio teneatur, fidei commissum quoque munere Falcidiæ fungetur. Si tamen alimenta præstari voluit, collationis totum onus in residuo donationis esse respondendum erit ex defuncti voluntate, qui de majore pecunia præstari non dubie voluit, integra*” (*i*). Ab eo, qui neque legatum neque fidei commissum, neque hæreditatem vel mortis causâ donationem accepit nihil per fidei commissum relinqui potest” (*k*). In our courts it seems to be established that a gift *mortis causâ* is good, although it is coupled with a trust or condition (*l*). It has been indeed suggested that the trust or condition should be declared contemporaneously with the gift, or under circumstances which would incorporate the trust or condition with the gift (*m*); but it is difficult to appreciate the grounds upon which this opinion is based. A trust, except it be of lands, may be declared by parol, and unless the recipient assented to the new terms the donor could resume possession (*n*).

§ 608. It has been already stated, that in the interpretation of purely personal legacies courts of equity follow the rules of the civil law; and in those which are charged on lands the rules of the common law (*o*). But, although this is generally true, it is not to be taken for granted, that courts of equity do, in all cases, follow the rules of courts of common law, in deciding upon the nature, extent, interpretation, and effect of legacies. There are some cases, in which courts of equity act upon principles peculiar to themselves in relation to legacies. But any attempt to point them out in a satisfactory manner would require a general review of the whole doctrine of legacies, a task which is incompatible with the objects of the present Commentaries.

(*h*) Inst. Lib. 2, tit. 7, § 1.

(*i*) Dig. Lib. 31, tit. 1, f. 77, § 1.

(*k*) Cod. Lib. 6, tit. 42, f. 9.

(*l*) *Hill v. Hill*, 8 M. & W. 401.

(*m*) *Dunne v. Boyd*, Ir. R. 8 Eq. 609.

(*n*) *Bunn v. Markham*, 7 Taunt. 224.

(*o*) *Ante*, § 602.

CHAPTER XI.

CONFUSION OF BOUNDARIES.

§ 609. HAVING disposed of the subjects of ADMINISTRATION and LEGACIES, we shall next proceed to the consideration of another head of concurrent jurisdiction, arising from the confusion of the boundaries of land, and the confusion or entanglement of other rights and claims of an analogous nature, calling for the interposition of courts of equity, in order to restore, and ascertain, and fix them.

§ 610. In the first place, in regard to CONFUSION OF BOUNDARIES. The issuing of commissions to ascertain boundaries is certainly a very ancient branch of equity jurisdiction. A number of cases of this sort will be found in the earliest of the chancery reports. Thus, in *Mullineux v. Mullineux*, in 14th Jac. I., a commission was awarded, "to set out lands, that lye promiscuously, to be liable for the payment of debts." In *Peckering v. Kimpton*, 5 Car. I. (a), a commission was awarded, "to set out copyhold lands free from lands which lye obscured; if the commissioners cannot sever it, then to set out so much in lieu thereof."

§ 611. It is not very easy to ascertain with exactness the origin of this jurisdiction (b). It has been supposed by Lord Northington and Lord Thurlow, that consent was the ground upon which it was originally exercised (c). There are two writs in the register concerning the adjustment of controverted boundaries, from one of which (in the opinion of Sir William Grant) it is probable that the exercise of this jurisdiction in the Court of Chancery took its commencement (d). The one is the writ *De Rationalibus divisis*, which properly lies where two men have lands in divers towns or hamlets, so that one is seised of the land in one town or hamlet, and the other of the land in the other town or hamlet by himself; and they do not know the boundaries of the towns or hamlets, whereby to ascertain which is the land of one and which is the land of the other. In such a case, to set the bounds

(a) Tothill 39 (edit. 1649). See also *Wake v. Conyers*, 1 Eden, 337, note; *Marquis of Bute v. The Glamorganshire Canal Co.*, 1 Phil. 681; Co. Litt. 169 a; Hargrave's note 23, vii.

(b) Hargrave's note 23, vii., to Co. Litt. 169a.

(c) *Speer v. Crawler*, 2 Meriv. 417.

(d) *Speer v. Crawler*, 2 Meriv. 417; Regist. Brevium, 157b.

certain, this writ lies for the one against the other (*e*). The other writ is *De Perambulatione facienda*. This writ is sued out with the assent of both parties, where they are in doubt of the bounds of their lordships or manors or of their towns. And upon such assent, the writ issues to the sheriff to make the perambulation, and to set out the bounds and limits between them in certainty (*f*). And it is added, in Fitzherbert (in which he follows the rule of the *Registrum Brevium*), that the perambulation may be made for divers towns and in divers counties; and the parties ought to come into the chancery, and there acknowledge and grant that a perambulation be made betwixt them; and the acknowledgment shall be enrolled in the chancery, and thereupon a commission or writ shall issue forth.

§ 612. Sir William Grant further conjectured that the jurisdiction having thus originated in consent, the next step would probably be to grant the commission on the application of one party, who showed an equitable ground for obtaining it, such as that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise, on such an equitable ground, no objection has ever been made (*g*); and, it may be added, no just objection can be made.

§ 613. This account of the origin of the chancery jurisdiction seems highly probable in itself; but however satisfactory it may seem, it can scarcely be said to afford more than a reasonable conjecture, and is not a conclusive proof that such was the actual origin. In truth, the recent discoveries made of the actual exercise of chancery jurisdiction in early times, as disclosed in the report of the Parliamentary Commissioners, already referred to in a former part of these Commentaries, are sufficient to teach us to rely with a subdued confidence upon all such conjectural sources of jurisdiction (*h*). It is very certain that, in some cases, the Court of Chancery has granted commissions, or directed issues, on no other apparent ground than that the boundaries of manors were in controversy.

§ 614. The civil law was far more provident than ours upon the subject of boundaries. It considered that there was a tacit agreement, or duty, between adjacent proprietors, to keep up and preserve the boundaries between their respective estates; and it enabled all persons having an interest to bring a suit to have the boundaries between them settled, and this, whether they were tenants for years, usufructuaries, mortgagees, or other proprietors. The action was called *actio finium regendorum*; and if the possession was also in dispute, that might be ascertained and fixed in the same suit, and,

(*e*) Fitzherb. Nat. Brev. 300 [128].

(*f*) Fitzherb. Nat. Brev. 300 [133].

(*g*) *Speer v. Cawter*, 2 Meriv. 417.

(*h*) *Ante*, §§ 37 to 44, and notes.

indeed, was incident to it (i). Perhaps it might not have been originally unfit for courts of equity to have entertained the same general jurisdiction, in cases of confusion of boundaries, upon the ground of enforcing a specific performance of the implied engagement or duty of the civil law. Such a broad origin or exercise of the jurisdiction has, however, never been claimed or exercised.

§ 615. But whatever may have been the origin of this branch of jurisdiction, it is one which has been watched with a good deal of jealousy by courts of equity of late years; and there seems no inclination to favour it, unless special grounds are laid to sustain it. The general rule now adopted is, not to entertain jurisdiction, in cases of confusion of boundaries, upon the ground that the boundaries are in controversy; but to require that there should be some equity superinduced by the act of the parties; such as some particular circumstances of fraud; or some confusion, where one person has ploughed too near another; or some gross negligence, omission, or misconduct on the part of persons whose special duty it is to preserve or perpetuate the boundaries, or with the object of preventing a multiplicity of suits (k).

§ 616. Where there is an ordinary legal remedy there is certainly no ground for the interference of courts of equity, unless some peculiar equity supervenes which a court of common law cannot take notice of or protect. It has been said by Lord Northington that, where there is no legal remedy, it does not therefore follow that there must be an equitable remedy, unless there is also an equitable right. Where there is a legal right there must be a legal remedy; and if there is no legal right, in many cases there can be no equitable one. On this account he dismissed a bill to settle the boundaries between manors, it appearing that there was no dispute as to the right of soil and freehold on both sides of the boundary marks (which right was admitted by the bill to be in the defendant), and that the right of seigniorial alone (an incorporeal hereditament), and not that of the soil, was in dispute. And his lordship on this occasion remarked, that "all the cases where the court has entertained bills for establishing boundaries have been where the soil itself was in question, or where there might have been a multiplicity of suits" (l).

§ 617. So, in a case where a bill was brought by one parish against another to ascertain the boundaries of the two parishes in making their rates; and a number of houses had been built upon land formerly waste; and it was doubtful to which parish each

(i) See 1 Domat, B. 2, tit. 6, § 1, 2, pp. 308, 309; Co. Litt. 169a, Hargrave's note (23); Dig. Lib. 10, tit. 1, f. 1.

(k) *Wake v. Conyers*, 1 Eden, 331; *Speer v. Cawter*, 2 Meriv. 410; *Marquis of Bute v. Glamorganshire Canal Co.*, 1 Ph. 681; *Att.-Gen. v. Stephens*, 6 De G. M. & G. 111.

(l) *Wake v. Conyers*, 1 Eden, 331.

part of the waste belonged; Lord Thurlow refused to interfere, and observed that the greatest inconvenience might arise from doing so. For, if a commission were granted, and the bounds set out by commissioners, any other parties, on a different ground of dispute, might equally claim another commission. These other commissioners might make a different return, and so, in place of settling differences, endless confusion would be created (*m*). In another report of the same case, he is reported to have said, If he should entertain the bill, and direct an issue in such a case as that, he did not see what case would be peculiar to the courts of law, and he did not know how to extract a rule from *The Mayor of York v. Pilkington*. Where there was a common right to be tried, such a proceeding was to be understood. That boundary between the two jurisdictions was apparent. This is the case, where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one. But in the case before him, he saw no common right, which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor-laws. The ground of dismissing the bill seems, from these very imperfect statements of the case, to have been, first, that the proper remedy was at law; and, secondly, that no equity was superinduced, for it would not even suppress multiplicity of suits.

§ 618. In *Atkins v. Hatton* (*n*), the court refused to entertain a bill brought by the rector of a parish principally for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe. The court said, “The plaintiff here calls upon the court to grant a commission to ascertain the boundaries of the parish, upon the presumption that all the lands which shall be found within those boundaries would be tithable to him. That is, indeed, a *prima facie* inference; but by no means conclusive. And there is no instance of the court ever granting a commission, in order to attain a remote consequential advantage. It is a jurisdiction which courts of equity have always been very cautious of exercising.” It is observable, that no special equity was here set up. But the party desired the commission solely upon the ground of founding a possible right against some persons for tithes, upon the ground, that the land which they occupied was intra-parochial and tithable. This was properly a matter at law to be ascertained by a special suit against every owner or occupant of land severally, and not against them jointly, in a bill to ascertain boundaries.

§ 619. These cases are sufficient to show, that the existence of a controverted boundary by no means constitutes a sufficient ground

(*m*) *St. Luke's Parish v. St. Leonard's Parish*, or *Waring v. Hotham*, 1 Bro. C. C. 40; 2 Dick. 550; cited 2 Anst. 395.

(*n*) 2 Anst. 386,

for the interposition of courts of equity, to ascertain and fix that boundary. Between independent proprietors such cases would be left to the proper redress at law. It is, therefore, necessary, to maintain such a bill (as has been already stated), that some peculiar equity should be superinduced (o). In other words, there must be some equitable ground attaching itself to the controversy. And we may, therefore, inquire, what will constitute such a ground. This has been in part already suggested. In the first place, it may be stated, that if the confusion of boundaries has been occasioned by fraud, that alone will constitute a sufficient ground for the interference of the court (p). And if the fraud is established, the court would by commission or under the modern practice, will by inquiring in chambers, ascertain the boundaries, if practicable; and, if not practicable, will do justice between the parties by assigning reasonable boundaries, or setting out lands of equal value (q).

§ 620. In the next place, it will be a sufficient ground for the exercise of jurisdiction, that there is a relation between the parties, which makes it the duty of one of them to preserve and protect the boundaries; and that by his negligence or misconduct, the confusion of boundaries has arisen. Thus, if, through the default of a tenant, or a copyholder (who is under an implied obligation to preserve them), there arises a confusion of boundaries, the court will interfere, as against such tenant or copyholder, to ascertain and fix the boundaries (r). It has been said that a tenant for life is under a similar obligation to the remainderman (s). But, it is indispensable to establish by suitable proof, that the boundaries, without such assistance, cannot be found (t). And the relation of the parties, entitling them to the redress, must also be clearly stated; for where the parties claim by adverse titles, without any super-induced equity, we have already seen, that the remedy is purely at law (u).

§ 621. In the next place, a bill in equity would lie to ascertain and fix boundaries, when it will prevent a multiplicity of suits. This is an old head of equity jurisdiction; and it has been very properly

(o) *Wake v. Conyers*, 1 Eden, 331; *Speer v. Cawter*, 2 Meriv. 410; *Marquis of Bute v. Glamorganshire Canal Co.*, 1 Ph. 681; *Att.-Gen. v. Stephens*, 6 De G. M. & G. 111.

(p) This is understood to have been the ground of the decision of the House of Lords in *Rous v. Barker*, 4 Bro. P. C. 660, reversing the decree of the Exchequer in the same cause. See *Atkins v. Hatton*, 2 Anst. 306.

(q) *Speer v. Cawter*, 2 Meriv. 418; *Godfrey v. Littells*, 1 Russ. & M. 59; 2 Russ. & M. 620; *Att.-Gen. v. Stephens*, 6 De G. M. & G. 111; *Spike v. Harding*, 7 Ch. D. 871; *Searle v. Cooke*, 43 Ch. D. 519.

(r) *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180; *Att.-Gen. v. Fullerton*, 2 Ves. & B. 263; *Spike v. Harding*, 7 Ch. D. 871; *Searle v. Cooke*, 43 Ch. D. 519.

(s) *Att.-Gen. v. Stephens*, 6 De G. M. & G. 111.

(t) *Miller v. Warmington*, 1 Jac. & W. 484.

(u) *Miller v. Warmington*, 1 Jac. & W. 484; *Bouverie v. Prentice*, 1 Bro. C. C.

applied to cases of boundaries (x). Indeed, in many cases of this nature, as for instance, where the right affects a large number of persons, such as a common right in lands, or in a waste claimed by parishioners, commoners, and others, where the boundaries have become confused by lapse of time, accident, or mistake, the appropriate remedy to adjust such conflicting claims, and to prevent expensive and interminable litigation, seems properly to be in equity (y). And it is not a complete answer to an action to settle the boundaries between two estates, that they are situate in a British colony if, in other respects, the bill is, from its frame, properly maintainable (z), but it would seem that no relief would be given if the lands were situate in a foreign country (a).

§ 622. There are cases of an analogous nature (which constitute the second class of cases, arising from confusion or entanglement of other rights and claims than to lands), where a mischief, otherwise irremediable, arising from confusion of boundaries, has been redressed in courts of equity. Thus, where a rent is chargeable on lands, and the remedy by distress is, by confusion of boundaries or otherwise, become impracticable, the jurisdiction of equity has been most beneficially exerted to adjust the rights and settle the claims of the parties (b).

§ 623. Other illustrations will present themselves more appropriately under other heads, in the course of these Commentaries. One instance, however, may be mentioned, in which courts of equity administer the most wholesome moral justice, following out the principles of law, and that is, where an agent, by fraud or gross negligence, has confounded his own property with that of his principal, so that they are not distinguishable. In such a case, the whole will be treated in equity as belonging to the principal, so far as it is incapable of being distinguished (c).

(x) *Wake v. Conyers*, 1 Eden, 331; *Warring v. Hotham*, 1 Bro. C. C. 40.

(y) *Marquis of Bute v. Glamorganshire Canal Co.*, 1 Phil. 681.

(z) *Carteret v. Petty*, 2 Swanst. 323 n.; *Penn v. Lord Baltimore*, 1 Ves. 444; *Tulloch v. Hartley*, 1 Y. & C. Ch. 114. See *Black Point Syndicate v. Eastern Concessions, Lim.*, 79 L. T. 658.

(a) *In re Hawthorne, Graham v. Massey*, 23 Ch. D. 743.

(b) *Duke of Bridgewater v. Edwards*, 6 Bro. P. C. 368; *Duke of Leeds v. New Radnor Corp.*, 2 Bro. C. C. 338, 518; *Basingstoke Corp. v. Lord Bolton*, 3 Drew. 50.

(c) *Lupton v. White*, 16 Ves. 432; *In re Oatway, Herstlet v. Oatway*, [1903] 2 Ch. 356.

CHAPTER XII.

DOWER.

§ 624. ANOTHER head of concurrent equitable jurisdiction is in matters of DOWER. As dower is a strictly legal right, it might seem, at first view, that the proper remedy belonged to courts of common law. The jurisdiction of courts of equity, in matters of dower for the purpose of assisting the widow by a discovery of lands or title-deeds, or for the removing of impediments to her rendering her legal title available at law, has never been doubted. And, indeed, it is extremely difficult to perceive any just ground upon which to rest an objection to it, which would not apply with equal force to the remedial justice of courts of equity, in all other cases of legal rights in a similar predicament. But the question has been made, how far courts of equity should entertain general jurisdiction to give general relief in those cases where there appears to be no obstacle to her legal remedy. Upon this question there has, in former times, been no inconsiderable discussion, and some diversity of judgment. But the result of the various decisions upon this subject is, that courts of equity assumed and exercised a general concurrent jurisdiction with courts of law in the assignment of dower in all cases (a). The ground most commonly suggested for this result was, that the widow was often much embarrassed, in proceedings upon a writ of dower at the common law, a cumbrous process which has now been abolished by statute, to discover the titles of her deceased husband to the estates out of which she claimed her dower (the title-deeds being in the hands of heirs, devisees, or trustees); to ascertain the comparative value of different estates; and to obtain a fair assignment of her third part (b). In such cases, where the title of the widow to her dower was not disputed, the court proceeded directly to the assignment of dower; but, if the title were disputed, the widow was required to establish her right by an issue at law (c).

§ 626. Upon principle, there would not seem to be any real difficulty in maintaining the concurrent jurisdiction in courts of equity

(a) *Curtis v. Curtis*, 2 Bro. C. C. 620; *Mundy v. Mundy*, 2 Ves. Jun. 122; s.c. 4. Bro. C. C. 294.

(b) Mitf. Eq. Pl. 121-123, by Jeremy, and note (a).

(c) *Curtis v. Curtis*, 2 Bro. C. C. 620.

in all cases of dower; for a case can scarcely be supposed in which the widow may not want either a discovery of the title-deeds, or of dowerable lands; or some impediment to her recovery at law removed; or an account of mesne profits before the assignment of dower; or a more full ascertainment of the relative values of the dowerable lands; and for any of these purposes (independent of cases of accident, mistake, or fraud, or other occasional equities), there seems to be a positive necessity for the assistance of a court of equity. And, if a court of equity has once a just possession of the cause in point of jurisdiction, there seems to be no reason why it should stop short of giving full relief, instead of turning the dowress round to her ultimate remedy at law, which is often dilatory, and always expensive. And the mere circumstance, that a discovery of any sort may be wanted to enforce the claim, would, under such circumstances, seem to furnish a sufficient reason why the jurisdiction for discovery should carry the jurisdiction for relief (*d*).

§ 627. Lord Eldon has put this matter in a strong light. After having remarked, that he did not know any case, in which an heir had claimed, merely as heir, an account (of mesne profits), without stating some impediment to his recovery at law; as, that the defendant has the title-deeds necessary to maintain his title; that terms are in the way of his recovery at law; or other legal impediments, which do, or may probably, prevent it; upon which probability, or upon the fact, the court might found its jurisdiction; he proceeded to say: "The case of the dowress is upon a principle somewhat, and not entirely, analogous to that of the heir. An indulgence has been allowed to her case, upon the great difficulty of determining *à priori*, whether she could recover at law, ignorant of all the circumstances, and the person, against whom she seeks relief, &c., having in his possession all the information necessary to establish her rights. Therefore it is considered unconscientious in him to expose her to all that difficulty, to which, if that information was fairly imparted, as conscience and justice require, she could not possibly be exposed (*e*).

§ 628. But the propriety of maintaining a general jurisdiction in equity, in matters of dower, is still more fully vindicated in a most elaborate opinion of Lord Alvanley, when Master of the Rolls, in a case which now constitutes the polar star of the doctrine. After advertg to the fact, that dower is a mere legal demand, and the widow's remedy is at law, he said: "But then, the question comes whether the widow cannot come, either for a discovery of those facts, which may enable her to proceed at law; and on an allegation of

(*d*) See *Dormer v. Fortescue*, 3 Atk. 130, 131; *Moor v. Black*, Cas. temp. Talb. 126; *Curtis v. Curtis*, 2 Bro. C. C. 620; *Mundy v. Mundy*, 2 Ves. Jun. 122; 4 Bro. C. C. 294.

(*e*) *Pulteney v. Warren*, 6 Ves. 89. See Co. Litt. 208, Butler's note (105), as to dower in the case of a mortgage for a term of years.

impediments thrown in her way in her proceedings at law, this court has not a right to assume a jurisdiction to the extent of giving her relief for her dower; and, if the alleged facts are not positively denied, to give her the full assistance of the court, she being, in conscience as well as at law, entitled to her dower." He then proceeded to state the reasons why the widow should have the assistance of the court by relief, as well as by discovery; insisting that the case of the widow is not distinguishable from that of an infant, where the relief would be clearly granted; and that it would be unconscientious to turn her round to a suit at law, for the recovery of her dower, which must be supposed to be necessary for her to live upon, when she has been compelled to resort to equity for a discovery. And he finally concluded by saying, that the widow laboured under so many disadvantages at law that she was fully entitled to every assistance that this court could give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right was ascertained (f).

§ 629. Dower, the author suggested, was highly favoured in equity. As dower in equitable estates was first conferred by the Dower Act, 1833, the statement is open to doubt. All that the Court of Chancery did was assist the dowress in asserting her legal rights.

§ 630. Indeed, a bill for a discovery and relief has been maintained against a purchaser for a valuable consideration without notice, upon the ground that the suit for dower was upon a legal title, and not upon a mere equitable claim, to which only the plea of a purchase for a valuable consideration can properly apply (g). This decision has been often found fault with, and, in some cases, the doctrine of it denied. It has, however, been vindicated, with great apparent force, upon that ground (h).

§ 630a. Owing to the operation of the Dower Act, 1833 (3 & 4 Will. 4, c. 105), questions of dower do not often arise, although they from time to time come before the Chancery Division. The dowress must assert her claim either to a share of the rents or to have lands assigned to her within twenty years after the husband's death, or her claim will be barred by her laches, although, according to the general rule, the Statute of Limitations is inapplicable (i).

(f) *Curtis v. Curtis*, 2 Bro. C. C. 620, 630 to 634.

(g) *Williams v. Lambe*, 3 Bro. C. C. 264.

(h) *Roper, Husband and Wife*, 446, 447. See *Collins v. Archer*, 1 Russ. & M. 284; *Ind, Coope & Co. v. Emmerson*, 12 App. Cas. 300.

(i) *Williams v. Thomas*, [1909] 1 Ch. 713.

CHAPTER XIII.

MARSHALLING OF SECURITIES.

§ 633. ANOTHER head of concurrent jurisdiction, in courts of equity, is that of MARSHALLING SECURITIES (a). We have already had occasion, in another place, to consider the topic of marshalling assets in cases of administration, to which the present bears very close analogy; and also the doctrine of apportionment and contribution between sureties, to which it also has a near relation. The general principle is, that, if one party has a lien on, or interest in, two funds, or properties, for a debt, and another party has a lien on, or interest in, one only of the funds or properties for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, wherever it will not trench upon the rights, or operate to the prejudice, of the party entitled to the double fund (b). There must be two funds or properties actually in existence. Thus in the case of a company incorporated prior to the statutes which enabled shareholders to limit their liability in respect of debts due to general creditors, it was held that the policy-holders could not require a call to be made to the extent of the debts due and paid to the general creditors in order that a particular fund might be increased for the purpose of paying them, they being limited in remedy to that fund (c). Also, if A. has a mortgage upon two different estates for the same debt, and B. has a mortgage upon one only of the estates for another debt, B. has a right to throw A., in the first instance, for satisfaction upon the security, which he, B., cannot touch; at least, where it will not prejudice A.'s rights, or improperly control his remedies (d). The expression "throwing" the creditor upon a particular fund or security is a repetition of the language of the cases. But the inaccuracy consists in defining the effect rather than the means by which a particular result is attained. It would be contrary to an elementary principle of equity to interfere with the rights of a creditor for value. He is permitted to exercise

(a) *Aldrich v. Cooper*, 8 Ves. 382.

(b) *Ibid.*; *Ex parte Kendall*, 17 Ves. 514; *In re Athill*, *Athill v. Athill*, 16 Ch. D. 211.

(c) *In re Professional Life Assurance*, L. R. 3 Eq. 668.

(d) *Gibson v. Seagrim*, 20 Beav. 614.

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(*d*) *Gibson v. Seagrim*, 20 Beav. 614.

drawn, had not the preferable creditor intervened; and this sum is held to be purchase money of the conveyance. This construction, preserving the preferable debt entire in the person of the second creditor, entitles him to draw payment of that debt out of the other tenement. By this equitable construction matters are restored to the same state as if the first creditor had drawn his payment out of the separate subject, leaving the other entire, for payment of the second creditor. Utility, also, concurs to support this equitable claim" (o).

§ 638. In this and the subsequent section the learned author referred to the right of a surety to a transfer of securities from the creditor, and to insist that the debtor should pay off the debt. With all deference to so learned an authority, this matter is hardly pertinent to the marshalling of securities.

§ 640. As between a debtor and his creditor, where the latter has a formal obligation of the debtor, and also a security or a fund, to which he may resort for payment, there seems to be no ground to say (at least, unless some other equity intervenes), that a court of equity ought to compel the creditor to resort to such fund, before he asserts his claim by a personal suit against his debtor. Why, in such a case, should a court of equity interfere to stop the election of the creditor, as to any of the remedies which he possesses in virtue of, or under, his contract? There is nothing in natural or conventional justice which requires it. It is true that a different doctrine has been strenuously maintained by very learned judges, in a most elaborate manner (p). But their opinions, however able, have been met by a reasoning exceedingly cogent, if not absolutely conclusive, on the other side. And, at all events, the settled doctrine now seems to be, in conformity to the early, as well as the latest, decisions, that the debtor himself has no right to insist that the creditor, in such a case, should pretermit any of his remedies, or elect between them, unless some peculiar equity springs up from other circumstances (q).

§ 641. The civil law, as we have seen, in the case of sureties, required the creditor, in the first instance, to pursue his remedy against the debtor. But, if the surety thought himself in peril of loss by the delay of the creditor, he might compel the latter to sue the debtor; and thus obtain his indemnity. "Fidejussor" (says the Digest (r)) "an, et prius quam solvat, agere possit, ut liberetur? Nec tamen semper expectandum est, ut solvat, aut iudicio accepto con-

(o) 1 Kaims, Equity, B. 1, Pt. 1, ch. 3, § 1, pp. 122, 123.

(p) See Lord Thurlow's opinion in *Wright v. Nutt*, 3 Bro. C. C. 326, and Lord Loughborough in *Folliot v. Ogden*, 1 H. Bl. 124. See also *Averall v. Wade*, Ll. & G. temp. Sugd. 255.

(q) *Holditch v. Mist*, 1 P. Will. 695; *Wright v. Simpson*, 6 Ves. 713; *Worthington v. Abbott*, [1910] 1 Ch. 588.

(r) Dig. Lib. 17, tit. 1, f. 38; ante, §§ 327, 494.

demnetur; si diu in solutione reus cessabit, aut certe bona sua dissipabit; præsertim, si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat." This is a very wholesome and just principle (s).

§ 642. But although courts of equity will thus administer relief to both parties in cases of double funds, which are subject to the same debt; and will, in favour of sureties, marshal the securities for their benefit; yet this will be so done only in cases where no injustice is done to the common debtor; for then other equities may intervene. And the interposition always supposes, that the parties seeking aid are creditors of the same common debtor; for if they are not, they are not entitled to have the funds marshalled, in order to leave a larger dividend out of one fund, for those who can claim only against that. The principle may be easily illustrated, by supposing the case of a joint debt due to one creditor by two persons, and a several debt due by one of them to another creditor. In such a case, if the joint creditor obtains a judgment against the joint debtors, and the several creditor obtains a subsequent judgment against his own several debtor; a court of equity will not compel the joint creditor to resort to the funds of one of the joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor. At least, it will not do so, unless it should appear that the debt, though joint in form, ought to be paid by one of the debtors only; or there should be some other supervening equity.

§ 643. Another case has been put, of a similar nature, by Lord Eldon. "We have gone this length" (said he): "If A. has a right to go upon two funds, and B. upon one, having both the same debtor, A. shall take payment from that fund, to which he can resort exclusively, that, by those means of distribution, both may be paid. That takes place, where both are creditors of the same person, and have demands against funds, the property of the same person. But it was never said, that, if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more; as if B. himself could insist, that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent, that all obligations arising out of these complicated relations may be satisfied. But if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if *not founded in some equity*, giving B. the right for his own sake, to compel me to seek payment from A" (t).

§ 644. Upon this ground, where there was a partnership of five persons, one of whom died, and the other four partners continued the

(s) See the learned opinion of Mr. Chancellor Kent in *Campbell v. Macomb*, 4 Johns. 538.

(t) *Ex parte Kendall*, 17 Ves. 520; *Solicitors and General Insce. v. Lamb*, 2 De G. J. & S. 251.

partnership, and afterwards became bankrupt; and the creditors of the four surviving partners sought to have the debts of the five paid out of the assets of the deceased partner, so that the dividend of the estate of the four bankrupts might be thereby increased in favour of their exclusive creditors; without showing, that the assets of the deceased partner ought, as between the partners, to pay those debts, or that there was any other equity to justify the claim; the court refused the relief (*u*). On that occasion, the Lord Chancellor (*x*) said: That, even if it was clear that the creditors of the five partners could go against the separate assets of the deceased partner (which, of course, depended upon equitable circumstances, as the legal remedy was against the survivors only); yet, if it was not clear that the survivors had a right to turn the creditors of the five against those assets, it did not advance the claim, that, without such arrangement, the creditors of the four would get less. Unless the latter could establish, that it is just and equitable, that the estate of the deceased partner should pay in the first instance, they had no right to compel a creditor to go against that estate, who had a right to resort to both funds. Indeed, there might exist an opposite equity: that of compelling the creditor to go first against the property of the survivors, before resorting to the estate of the deceased partner.

§ 645. The ground of all these decisions is the same general doctrine already suggested, though the application of that doctrine is necessarily varied by the circumstances. Where a creditor has a right to resort to two persons who are his joint and several debtors, he is not compellable to yield up his remedy against either, since he has a right to stand upon the letter and spirit of his contract, unless some supervening equity changes or modifies his rights. If each debtor is equally bound in equity and justice for the debt, as in the case of joint debtors or partners, where both have had the full benefit of the debt, the interference of a court of equity, to change the responsibility from both debtors or partners to one, would seem to be utterly without any principle to support it, unless there was a duty in one of the debtors or partners to pay the debt in discharge of the other. And, if this be so, *à fortiori*, the creditors of one of the debtors, or partners, cannot be entitled to such interference for their own benefit; for they can, in no just sense, in such a case, work out any right, except through the equity of the debtor or partner under whom their title is derived.

(*u*) *Ex parte Kendall*, 17 Ves. 514.

(*x*) Lord Eldon

CHAPTER XIV.

PARTITION.

§ 646. ANOTHER head of concurrent jurisdiction is that of PARTITION in cases of real estate by joint tenants, tenants in common, and coparceners. It is not easy, as has been well observed by Mr. Fonblanque, to trace back or establish the origin of any branch of equitable jurisdiction (*a*). But the jurisdiction of courts of equity to partition freehold lands, including manors and manorial rights (*b*), for it did not extend to copyhold or customary lands (*c*), is, beyond question, very ancient (*d*). It is curious enough to observe the terms of apparent indignation with which Mr. Hargrave has spoken of this jurisdiction, as if it were not only new, but a clear usurpation. Yet he admits its existence and practical exercise as early as the reign of Queen Elizabeth (*e*)—a period so remote that at least one-half of the law, which is at present, by way of distinction, called the common law, and regulates the rights of property and the operation of contracts, and especially of commercial contracts, has had its origin since that time. “A new and compulsory mode of partition (says Mr. Hargrave) has sprung up, and is now fully established, namely, by decree of chancery, exercising its equitable jurisdiction on a bill filed, praying for a partition, in which it is usual for the court to issue a commission for the purpose to various persons who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition, and wresting from a court of common law its ancient exclusive jurisdiction of this subject, might be traced by examining the records of chancery, I know not. But the earliest instance of a bill of partition, I observe, to be noticed in the printed books, is a case of the 48th Elizabeth, in Tothill’s Transactions of Chancery, title “Partition” (*f*). According to this short report of the case, the court interfered from necessity, in respect of the minority of one of the parties, the book expressing that, on that account, he could not be made a party to a writ of partition; which reason seems very inaccurate; for, if Lord Coke is right, that writ doth lie against an

(*a*) 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

(*b*) *Hanbury v. Hussey*, 14 Beav. 152.

(*c*) *Jope v. Morshead*, 6 Beav. 213.

(*d*) See generally *Agar v. Fairfax*, 17 Ves. 533.

(*e*) See Mr. Fonblanque’s remarks on the passage, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*). (*f*) *Speke v. Walrond, &c.* (*a*), Tothill’s Trans. 155 (edit. 1649).

infant, and he shall not have his age in it, and after judgment he is bound by the partition (g). But probably, in Lord Coke's time, this was a rare and rather unsettled mode of compelling partition; for, I observe, in a case in chancery, of the 6th Charles I., which was referred to the judges on a point of law between two coparceners, that the judges certified for issuing a writ of partition between them, and that the court ordered one accordingly; which, I presume, would scarcely have been done if the decree for partition and a commission to make it had then been a current and familiar proceeding with chancery (h). However, it appears by the language of the court in a very important cause, in which the grand question was, whether the Lord Chancellor here could hold plea of a trust of lands in Ireland that, in the reign of James II., bills of partition were become common" (i).

§ 647. These remarks of the learned author are open to much criticism, if it were the object of these commentaries to indulge in such a course of discussion. It cannot, however, escape notice that, when the learned author speaks of this branch of equitable jurisdiction as trenching upon the writ of partition, and wresting from the courts of common law their ancient *exclusive* jurisdiction over the subject, he assumes the very matter in controversy. That the writ of partition is a very ancient course of proceeding at the common law is not doubted. But it by no means follows, that the courts of common law had an exclusive jurisdiction over the subject of partition. The contrary may fairly be deemed to have been the case, from the notorious inadequacy of that writ to attain, in many cases, the purposes of justice. Thus, for instance, we know that until the reign of Henry VII. no writ of partition lay, except in the case of parceners. Littleton (§ 264) expressly says, "For, such a writ lyeth by parceners only." And to show how narrowly the whole remedial justice of this writ was construed, it was the known settled doctrine, that, if "two coparceners be, and one should aliene, in fee, the remainder parcener might bring a writ of partition against the alienee; but the alienee could not have such a writ *against* the parcener. And the like diversity existed in cases of a writ of partition by or against a tenant by the curtesy" (k). Now, such a case would, upon the very face of it, constitute a clear case for the interposition of a court of chancery; upon the ground of the total defect of any remedy at law, and yet of an unquestionable equitable right to partition. Cases of joint tenancy and tenancy in common afford equally striking illustrations. Until the statute of 31 Henry 8, c. 1, and 32 Henry 8, c. 32, no writ of partition lay at law for a joint-tenant or tenant in common (l). And yet the grossest injustice might have arisen, if a court of chancery could not in such a case have interposed and granted relief, upon the

(g) Co. Litt. 171 b.

(h) *Drury v. Drury*, 1 Ch. Rep. 49.

(i) Hargrave's note (2) to Co. Litt. 169 d.

(k) Co. Litt. 175 a.

(l) Co. Litt. 175 a; 2 Black. Comm. 185; Com. Dig. *Parcener*, C. 6.

analogy to the legal remedy. The reason given at the common law against partition in such cases was more specious than solid. It was, that a joint tenancy being an estate originally created by the act or agreement of the parties, the law would not permit any one or more of the tenants to destroy the united possession without a similar universal consent. The good sense of the doctrine would rather seem to be, that the joint tenancy being created by the act or agreement of the parties, in a case capable of a severance of interest, the joint interest should continue (exactly as in cases of partnership) so long as, and no longer than, both parties should consent to its continuance.

§ 648. Mr. Justice Blackstone has cited the civil law, as confirmatory of the reasoning of the common law: “*Nemo enim invitus compellitur ad communionem*” (*m*). But that law deemed it against good morals to compel joint owners to hold a thing in common; since it could not fail to occasion strife and disagreement among them. Hence, the acknowledged rule was, “*In communione vel societate nemo compellitur invitus detineri*” (*n*). And, therefore, a decree of partition might always be insisted on, even when some of the part-owners did not desire it. “*Communi dividendo judicium ideo necessarium fuit, quod pro socio actio magis ad personales invicem præstationes pertinet, quam ad communem rerum divisionem*” (*o*). *Etsi non omnes, qui rem communem habent, sed certi ex his dividere desiderant, hoc judicium inter eos accipi potest*” (*p*).

§ 649. But, independently of considerations of this sort, which might have brought many cases of partition into the Court of Chancery, in very early times, from the manifest defect of any remedy at law, there must have been many cases, where bills for partition were properly entertainable upon the ordinary ground of a discovery wanted, or of other equities, intervening between the parties (*q*). Lord Loughborough, upon one occasion, said that there is no original jurisdiction in chancery in partition, which is a proceeding at the common law (*r*). This may be true *sub modo*, where the party is completely remediable at law; but not otherwise. On another occasion his lordship said: “A party, choosing to have a partition, has the law open to him; there is no equity for it. But the jurisdiction of this court obtained upon a principle of *convenience*. It is not for the court to say, one party shall not hold his estate, as he pleases; but another person has also the same right to enjoy his part, as he pleases; and, therefore, to have the estate divided. The law has provided, that one shall not defeat the right of the other to the divided estate. Then the only question is, whether

(*m*) Dib. Lib. 12, tit. 6, f. 26, § 4; 2 Black. Comm. 185, note (*c*).

(*n*) Cod. Lib. 3, tit. 37, f. 5 *ult*.

(*o*) Dig. Lib. 10, tit. 3, f. 1.

(*p*) Dig. Lib. 10, tit. 3, f. 8; Fulbeck's Parallel, B. 2, pp. 57, 58; Ersk. Inst. B. 3, tit. 3, § 56; 1 Stair's Inst. 48.

(*q*) See *Watson v. Duke of Northumberland*, 11 Ves. 155, *arguendo*.

(*r*) *Mundy v. Mundy*, 2 Ves. Jun. 124.

the legal mode of proceeding is so convenient, as the means this court affords, to settle the interests between them with perfect fairness and equality? It is evident that the commission is much more convenient than the writ; the valuation of these proportions is much more considered: the interests of all parties are much better attended to; and it is a work carried on for the common benefit of both" (s).

§ 650. This language (it must certainly be admitted) is sufficiently loose and general. But it appears to be by no means a just description of the true nature and reason of the jurisdiction of courts of equity in cases of partition. It is not a jurisdiction founded at all in mere convenience; but in the judicial incompetency of the courts of common law, to furnish a plain, complete, and adequate remedy for such cases; for the writ of partition at the common law was a real action, a cumbersome, oppressive, and highly technical form of procedure finally abolished by statute 3 & 4 Will. 4, c. 27, s. 36. After that date the jurisdiction of the Court of Chancery became exclusive, and is now vested in the Chancery Division of the High Court by section 34, subsection 3 of the Judicature Act, 1873 (36 & 37 Vict. c. 66). The true ground is far more correctly stated by Lord Redesdale, in his admirable treatise on Pleadings in Equity. "In cases of partition of an estate," says he, "if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are effected by first ascertaining the rights of the several persons interested; and then issuing a commission to make the partition required; and, upon the return of the commissioners, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties" (t). According to the modern practice, the rights of the parties are adjusted by means of a reference to chambers.

§ 651. The ground, here stated, is of a complication of titles, as the true foundation of the jurisdiction. But it is not even here expressed with entire legal precision. However complicated the titles of the parties might be, still, if they could be thoroughly investigated at law, in the usual course of proceedings in the common-law courts, there would seem to be no sufficient reason for transferring the jurisdiction of such cases to the courts of equity. The true expression of the doctrine should have been, that courts of equity interfere in cases of such a complication of titles, because the remedy at law is inadequate and imperfect, without the aid of a court of equity to promote a discovery, or to remove obstructions to the right, or to grant some other equitable redress (u).

(s) *Calmady v. Calmady*, 2 Ves. Jun. 570. See also *Baring v. Nash*, 1 Ves. & B. 555.

(t) *Mitford*, Eq. Pl. by Jeremy, 120; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), pp. 120, 121.

(u) *Agar v. Fairfax*, 17 Ves. 533.

§ 652. "Partition at law" (said Lord Redesdale), "and in equity, are different things. The first operates by the judgment of a court of law, and delivering up possession in pursuance of it; which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties; and, if the parties be not competent to execute the conveyances, the partition cannot be effectually had" (x). Hence, if the infancy of the parties, or other circumstances, prevented such mutual conveyances, the decree could only extend to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances could be made. If the defect arose from infancy, the infant must have had a day after attaining twenty-one years to show cause against the decree. If a contingent remainder, not barrable or extinguishable, were limited to a person not in existence, the conveyance could not be made until he came into being, and was capable, or until the contingency was determined. An executory devisee might occasion a similar embarrassment. And, in either of these cases, a supplemental bill was necessary to carry the original decree into execution (y). The difficulties indicated have been removed by legislation the effect of which will be discussed hereafter.

§ 653. It is upon this account, that Lord Hardwicke has spoken of the remedy by partition in equity, as being discretionary, and not a matter of right in the parties. "Here" (said he) "the reason" (that the plaintiff should show a title in himself, and not allege, generally, that he is in possession of a moiety of the land) "is because conveyances are directed, and not a partition only, which makes it discretionary, in this court, where a plaintiff has a legal title (whether) they (it) will grant a partition or not; and where there are suspicious circumstances in the plaintiff's title, the court will leave him to law" (z). His lordship was here speaking of legal titles; for, in the same case, he expressly stated, that, where the bill for a partition was founded on an equitable title, a court of equity might determine it; or otherwise, there would be no remedy (a). And, indeed, if there are no suspicious circumstances, but the title is clear at law, the remedy for a partition in equity is as much a matter of right, as at law (b).

§ 654. In regard to partitions, there was also another distinct ground upon which the jurisdiction of courts of equity was maintainable, as it constituted a part of its appropriate and peculiar remedial justice. It is, that courts of equity were not restrained, as courts of law were, to a mere partition or allotment of the lands and other real estate between the parties, according to their respective interests in

(x) *Whaley v. Dawson*, 2 Sch. & Lefr. 371, 372.

(y) *Mitford*, Eq. Pl. by Jeremy, 120, 121.

(z) *Cartwright v. Pultney*, 2 Atk. 380.

(a) *Cartwright v. Pultney*, 2 Atk. 380.

(b) *Baring v. Nash*, 1 Ves. & B. 555, 556; *Parker v. Gerrard*, Ambler 286, and Mr. Blunt's note.

the same, and having regard to the true value thereof; but courts of equity might, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality (c). This a court of common law was not at liberty to do; for when a partition was awarded by such a court, the exigency of the writ was, that the sheriff should cause, by a jury of twelve men, a partition to be made of the premises between the parties, regard being had to the true value thereof; without any authority to make compensation for any inequality in any other manner (d). This was in itself a sufficient ground of equity jurisdiction.

§ 655. Cases of a different nature, involving equitable compensation, to which a court of law is utterly inadequate, may easily be put; such, for instance, as cases, where one party has laid out large sums in improvements on the estate. For, although, under such circumstances, the money so laid out does not, in strictness, constitute a lien on the estate (e); yet, a court of equity will not grant a partition without first directing an account, and compelling the party applying for partition to make due compensation (f). So, where one tenant in common has been in personal occupation or in the exclusive perception of the rents and profits, on a bill for a partition, the court will fix him with an occupation rent or direct an account of the rents and profits received (g). So, where one tenant in common, supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements; or if that cannot be done, he will be entitled to a compensation for those improvements (h).

§ 656. Indeed, in a great variety of cases, especially where the property is of a very complicated nature, as to rights, easements, modes of enjoyment, and interfering claims, the interposition of a court seems indispensable for the purposes of justice. For since partition is ordinarily a matter of right, no difficulty in making a partition is

(c) Co. Litt. 176 a and b; *ibid.* 168 a. See *Earl of Clarendon v. Hornby*, 1 P. Will. 446; *Warner v. Baynes*, Ambler 589; *Storey v. Johnson*, 2 Y. & C. 586; *Mole v. Mansfield*, 15 Sim. 41.

(d) *Kay v. Johnston*, 21 Beav. 536.

(e) Co. Litt. 167 a; Com. Dig. *Pleader*, 3 F. 4. Littleton (§ 251) has spoken of a rent-charge in cases of partition for owelty or equality in partition. But this not in a case of compulsory partition by writ; but of a voluntary partition by deed or parol, as the context abundantly shows. Co. Litt. 169 b; Litt. § 250, 352.

(f) *Swan v. Swan*, 8 Price 518; *In re Jones, Farrington v. Forester*, [1893] 2 Ch. 461.

(g) *Hill v. Fulbrook*, 1 Jac. 574; *Pascoe v. Swan*, 27 Beav. 508; *Teasdale v. Sanderson*, 33 Beav. 534.

(h) See *Parker v. Trigg*, W. N. (1874), p. 27; *Watson v. Gass*, 51 L. J. Ch. 480; *Williams v. Williams*, 68 L. J. Ch. 528; *Kenrick v. Mountstephen*, 48 W. R. 141.

allowed to prevail in equity, whatever may be the case at law, as the powers of the court are adequate to a full and just compensatory adjustment (*i*). There have been cases disposed of in equity which seemed almost impracticable for allotment at law, as in the case of the Cold Bath Fields, in which Lord Hardwicke did not hesitate to act, notwithstanding the admitted difficulties (*k*). The Court of Chancery would order a partition if there were parties before the court, who possessed competent present interests, such as a tenant for life, or for years (*l*); but not parties entitled in reversion or remainder expectant upon a present interest (*m*), and the order so made was binding upon those parties only who were before the court, and those whom they virtually represent as parties entitled in remainder although not yet in existence (*n*): and the interests of third persons are not affected (*o*). And it is not an unimportant ingredient in the exercise of equity jurisdiction, in cases of partition, that the parties in interest may be brought before the court, far more extensively than they can be by any processes known to the courts of law, for the purpose of doing complete justice (*p*). It is no longer necessary to make all persons interested parties to the proceedings in the first instance (*q*).

§ 657. In equity, too (and it would seem that the same rule prevails at law, though this has sometimes been doubted), where there are divers parcels of lands, messuages, and houses, partition need not be made of each estate separately, so as to give to each party his moiety or other portion in every estate. But the whole of one estate may be allotted to one, and the whole of another estate to the other, provided that his equal share is allotted to each (*r*). But it is obvious that, at law, such a partition can rarely be conveniently made, because the court cannot decree compensation, so as to make up for any inequality, which must ordinarily occur in the allotment of different estates to each party. In equity it is in the ordinary course (*s*).

§ 658. It is upon some or all of these grounds, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity, and their ability to clear away all immediate obstructions against complete justice, that these courts have assumed a general concurrent juris-

(*i*) *Ante*, § 653.

(*k*) *Warner v. Baynes*, Ambler 589.

(*l*) *Wills v. Slade*, 6 Ves. 498; *Baring v. Nash*, 1 Ves. & B. 555; *Gaskell v. Gaskell*, 6 Sim. 643; *Heaton v. Dearden*, 16 Beav. 147.

(*m*) *Evans v. Bagshaw*, L. R. 5 Ch. 340.

(*n*) Story on Eq. Pl. § 144 to 148; *Gaskell v. Gaskell*, 6 Sim. 643.

(*o*) *Agar v. Fairfax*, 17 Ves. 544; *Watkins v. Williams*, 3 Mac. & G. 622.

(*p*) *Anon.*, 3 Swanst. 139, note (*b*).

(*q*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 9.

(*r*) *Earl of Clarendon v. Hornby*, 1 P. Will. 446; *Peers v. Needham*, 19 Beav. 316.

(*s*) *Ante*, § 654.

diction with courts of law in all cases of partition. So that, it is not now deemed necessary to state, in the bill, any peculiar ground of equitable interference (*t*). And, unless I am greatly misled in my judgment, this review of the true sources and objects of this concurrent jurisdiction demonstrates, in the most satisfactory manner, how ill-founded the animadversions of Mr. Hargrave (already cited) are, upon the exercise of this jurisdiction (*u*). But the most conclusive proof in its favour is, that, wherever it exists, it has almost entirely superseded any resort to courts of law to obtain a partition. In making partition, however, courts of equity generally follow the analogies of the law; and will decree in such cases, as the courts of law recognize as fit for their interference (*x*). But courts of equity are not therefore to be understood as limiting their jurisdiction in partition to cases cognizable or relievable at law; for there is no doubt, that they may interfere in cases where a partition would not lie at law (*y*); as, for instance, in the case where an equitable title is set up (*z*) or where the estate to be divided is incorporeal. With regard to equitable estates a distinction must be drawn between those cases in which trustees hold property upon trust for sale, and those in which they merely have a power of sale. In the former case there could be no partition, for in the eyes of a court of equity the parties would only be entitled to the property in its converted state, unless all the parties being *sui juris* elected to take the property in its unconverted state (*a*).

§ 658*a*. Many improvements in procedure in partition actions have been introduced by the Partition Act, 1868 (31 & 32 Vict. c. 40), and the Partition Act, 1876 (39 & 40 Vict. c. 17), the most material being the power to order a sale and division of the proceeds, against the will of one or more of the parties interested. Prior to this statute if the only outstanding interest was vested in an infant the court could by a side wind, if a sale were in fact beneficial to the infant, make an order to that effect (*b*); but against the wish of an adult part owner there could be no sale (*c*). Under sect. 3 of the Act of 1868, the court is invested with a discretion to order a sale upon the application of any of the parties interested, and notwithstanding the dissent or disability of any others of them "if it appears to the court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circum-

(*t*) Mitford, Eq. Pl. by Jeremy, 120.

(*u*) *Ante*, § 646.

(*x*) *Ante*, § 646; *Wills v. Slade*, 6 Ves. 498; *Baring v. Nash*, 1 Ves. & B. 555.

(*y*) *Swan v. Swan*, 8 Price 519.

(*z*) *Cartwright v. Pultney*, 2 Atk. 380; Com. Dig. Chancery, 4 E., *Partition*; *ante*, § 653.

(*a*) *Biggs v. Peacock*, 22 Ch. D. 284; *Boyd v. Allen*, 24 Ch. D. 622.

(*b*) *Davis v. Turvey*, 32 Beav. 554; *Hubbard v. Hubbard*, 2 H. & M. 38.

(*c*) *Griffies v. Griffies*, 8 L. T. 758.

stance," a sale and distribution of the proceeds would be more beneficial to the parties (*d*). By sect. 4 of the same statute, "the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property" may force a sale unless the court "sees good reason to the contrary" (*e*). The only instance in which opposition has been successfully made to an application for a sale under sect. 4, was where it appeared that the party asking for a sale was actuated by spite or ill-will (*f*). There is also a power to order a sale on the application of any party "unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale" (*g*).

(*d*) *Pitt v. Jones*, 5 App. Cas. 659.

(*e*) *Pemberton v. Barnes*, L. R. 6 Ch. 685; *Porter v. Lopes*, 7 Ch. D. 358.

(*f*) *Saxton v. Bartley*, 48 L. J. Ch. 519.

(*g*) *Williams v. Games*, L. R. 10 Ch. 204; *Richardson v. Feary*, 39 Ch. D. 45.

CHAPTER XV.

PARTNERSHIP.

§ 659. ANOTHER head of concurrent jurisdiction arising from similar causes is in relation to PARTNERSHIP (*a*). In cases of this nature, where a remedy at law actually exists, it is often found to be very imperfect, inconvenient, and circuitous. But in a very great variety of cases, there is, in fact, no remedy at all at law to meet the exigency of the case. We shall, in the first instance, take notice of such remedies as exist at law; and then proceed to the consideration of others, which are peculiar to courts of equity.

§ 660. And here it may be proper to begin by a reference to that, which is, in its own nature, preliminary to all other inquiries, to wit, the actual existence of the partnership itself. Although, in many cases, written articles or instruments of partnership exist, as the foundation of the joint concerns; yet, in many other cases, the partnership itself exists merely in parol; and even in cases of written articles, there are many defects and omissions, which the parties have left unprovided for. Now a controversy may arise in regard to the existence of the partnership between the partners themselves, or between them and third persons. In each case its existence may mainly depend upon the discovery which formerly could only be obtained through the instrumentality of a court of equity. If written articles exist, they may be suppressed or concealed; if none exist it may be impracticable to obtain due knowledge of the partnership by any competent witnesses in the ordinary course of law. But, in by far the most numerous and important class of cases, that of secret and dormant partners, there ordinarily was not any adequate means at law to get at the names or numbers of the partners. In all such cases, the powers of a court of equity were most effective by means of a bill of discovery, in bringing out all the facts, as well

(*a*) See Com. Dig. Chancery, 3 V. 6. By the Judicature Act, 1873, s. 34, sub-s. 3. the dissolution of partnerships, or the taking of partnership or other accounts, is assigned to the Chancery Division of the High Court of Justice. The law of partnership has been codified by the Act to Declare and Amend the Law of Partnership (53 & 54 Vict. c. 39). This Act defines "Partnership" as follows: "Partnership is the relation which subsists between persons carrying on a business in common with a view to profit."

in controversies between the partners themselves, as between them and third persons.

§ 661. But admitting a partnership to exist, let us now proceed to consider what were formerly the remedies at law which exist between the partners themselves. These, of course, were formerly dependent upon the nature of the partnership, and the grievance for which a remedy is sought. If the articles of partnership were under seal, and any violation of any of the stipulations therein contained existed, it might be, and was, properly, remediable by an action of covenant (*b*). If there were written articles not under seal, or the partnership was by a parol agreement, the proper remedy for any breach of the stipulations was by an action of assumpsit. But, as we shall presently see, both these remedies were utterly inadequate to provide for many exigencies and injuries, which might arise out of the violation of partnership rights and duties.

§ 662. The most extensive, and generally the most operative, remedy at law, between partners, was an action of account. This was the appropriate, and, except under very peculiar circumstances, was the only, remedy, at the common law, for the final adjustment and settlement of partnership transactions. It is a very ancient remedy between partners, in which one, naming himself a merchant, may sue his partner for a reasonable account, naming him a merchant, and charging him as the receiver of the moneys of himself, arising from whatever cause or contract, for the common profit of both, according to the law-merchant (*c*).

§ 663. But it is wholly unnecessary to dwell upon the inadequacy of this remedy in cases of partnership, as all the remarks already made in respect to the dilatory, cumbrous, and inconvenient proceedings in actions of account (*d*), apply, with augmented force, to cases of partnership where it is absolutely impossible, in many cases, to settle the concerns of the partnership, without the production of books, vouchers, and other documents belonging to the partnership, and the personal examination of the partners themselves. So intimate is the confidence and so universal the community of interest and operations between partners, that no proceedings, not including a thorough and minute discovery, can enable any court to arrive at the means of doing even reasonable justice between them. And, in addition to the common difficulties in ordinary cases, the death of either partner puts an end, at the common law, to any means of enforcing this remedy by account; for it being founded in privity between the parties, no suit lay by or against the personal representative of the deceased partner to compel an account (*e*).

(*b*) *Schlenker v. Morsy*, 3 B. & C. 789.

(*c*) Co. Litt. 172 *a*; Fitz. F. B. 117, D.

(*d*) *Ante*, §§ 442 to 449.

(*e*) *Ante*, § 446.

§ 664. In a few cases, indeed, where there has been a covenant or promise to account, courts of law have attempted to approximate towards an effectual remedy in the shape of damages for a breach of the obligation. But it is manifest, that, even in these cases, the damages must be wholly uncertain, unless an account can be fully and fairly taken between the parties; for, otherwise, there will be no rule by which to ascertain the damages. There has, too, been a struggle, in cases where one partner has been compelled to advance or pay money on the partnership account out of his own private funds, to give him a remedy at law for a contribution from the other partners. But it is difficult to perceive, how, except under very peculiar circumstances, such a remedy will lie. For it is impossible, during the continuance of the partnership, without taking a general account, to say, that any one partner, so called upon to advance or to pay money, is, on the whole, a creditor of the firm to such an amount. And if he is, how, in point of technical propriety, can he institute a remedy against his other partners alone, as contradistinguished from the partnership? It is very certain, that, if he should lend the partnership a sum of money, he could not sue for it at law, for he could not sue himself; and it is not very easy to perceive a clear distinction between this and the former case. And if it should turn out, upon taking a general account, that such partner was a debtor to the partnership, it would be unreasonable and useless to allow him to recover the very money which he must refund to the partnership; for the maxim of common sense, as well as of common justice is *Frustra petis, quod statim alteri reddere cogaris* (f).

§ 665. Cases have also occurred in which suits at law have been maintained for the breach of an agreement to furnish a certain sum or stock for the partnership purposes. In such a case the transaction is not so much a partnership transaction as an agreement to launch the partnership; and an agreement to pay money or furnish stock for such a purpose, is an individual engagement of each partner to the other (g). For the breach of such an agreement, there seems no reasonable objection to the maintenance of a suit at law. But, what should be the measure of the damages must depend upon the circumstances of each particular case. No general rule can be laid down to govern all cases. If the partnership has no specific term fixed for its continuance, in many cases the damages would be merely nominal. If it has such a specific fixed term, the damages must necessarily be of a very uncertain nature and extent. The whole sum agreed for the partnership stock could not be the true rule; for that would be in effect to give one partner the whole capital stock. And, on the other hand, the possible profits of the partnership, if

(f) Branch's Maxims, p. 63; *Sprange v. Lee*, [1908] 1 Ch. 424.

(g) See *Venning v. Leckie*, 13 East, 7; *Gale v. Leckie*, 2 Stark. 107.

carried on, would not furnish a rule because of the uncertainty of such profits, and possibly to arise *in futuro*, and the injury not being certain at the time of the breach.

§ 666. The remedial justice administered by courts of equity is far more complete, extensive, and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner, where no redress whatsoever, or very imperfect redress, could be obtained at law. In the first place, they may decree a specific performance of a contract to enter into a partnership for a specific term of time (for it would, ordinarily (*h*), be useless to enforce one, which might be dissolved instantly at the will of either party), and to furnish a share of the capital stock, which a court of law is incapable of doing. This remedy, however, if ever, is rarely granted (*i*).

§ 667. In like manner, after the commencement and during the continuance of the partnership, courts of equity will, in many cases, interpose to decree a specific performance of agreements in the articles of partnership (*k*). If, for instance, there be an agreement to insert the name of a partner in the firm name, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, courts of equity will grant a specific relief by an injunction against the use of any other firm name, not including his. But the remedy in such cases is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trivial omission (*l*). So, where a partner in breach of the general law or of an express provision in the articles engages in a competing business, courts of equity will act by injunction to enforce his performance of his obligation to restrict his industry to the partnership; and, if profits have been made by any partner, in violation of such an agreement, in any other business, the profits will be decreed to belong to the partnership (*m*). So, if it is agreed that upon the dissolution of a partnership a certain partnership book shall belong to one of the partners and the other shall have a copy of it, courts of equity will decree a specific performance (*n*). Indeed, a partner will be ordered to restore the books to the place of business of a partnership (or the principal place if more than one), unless the

(*h*) This qualification (ordinarily) is necessary; for a specific performance may, in some cases, be important to establish rights under a partnership which has no fixed term for its continuance. Mr. Swanston, in his excellent note to *Crawshay v. Maule*, 1 Swanst. 511, 512, 513, has clearly shown the propriety of the qualification.

(*i*) *Sichel v. Moseenthal*, 30 Beav. 371; *Scott v. Rayment*, L. R. 7 Eq. 112.

(*k*) *Const v. Harris*, T. & R. 496; *Watney v. Trist*, 45 L. J. Ch. 412.

(*l*) *Marshall v. Colman*, 2 J. & W. 266; *Cheesman v. Price*, 35 Beav. 142.

(*m*) Partnership Act, 1890, s. 30; *Aas v. Benham*, [1891] 2 Ch. 244.

(*n*) *Lingen v. Simpson*, 1 Sim. & Stu. 600.

articles make some other provision for their disposal (o). And numerous other examples, illustrative of the general principle, might be given (p).

§ 668. The Court of Chancery, in the case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, did on one occasion interfere (as it should seem) to qualify or restrain that renunciation; but such a jurisdiction would now be exercised with the utmost caution, if it were not entirely disclaimed (q).

§ 670. These are instances (and others might be mentioned) of the remedial justice of courts of equity, in carrying into specific effect the articles of partnership where the remedy at law would be wholly illusory or inadequate. But it is not hence to be inferred that courts of equity would, in all cases, interfere to enforce a specific performance of such articles. Where the remedy at law was entirely adequate, no relief will be granted in equity. And a stipulation, purporting to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of any disputes, to refer the same to arbitrators, was regarded both by courts of equity and of the common law as illegal (r); but it has since been enacted that persons may make agreements to submit matters in dispute between them to arbitration, so far binding, that if either party brings an action in violation of such an agreement, the other party may apply for a stay of proceedings (s).

§ 671. The remedial justice of courts of equity is not confined to cases of the nature above stated. They may not only provide for a more effectual settlement of all the accounts of the partnership after a dissolution, but they may take steps for this purpose, which courts of law are inadequate to afford. After some difference of opinion and conflicting decisions it has been settled that they may interpose, and decree an account, where a dissolution has not taken place, and is not asked for, although, ordinarily, they are not inclined to decree an account, unless under special circumstances, if there is not an actual or contemplated dissolution, so that all the affairs of the partnership may be wound up (t).

§ 672. But where such dissolution has taken place, an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business, and make sale of the partnership property; so that a final distribution may be made of the

(o) Partnership Act, 1890, s. 24, sub-s. 9; *Greatrex v. Greatrex*, 6 De G. & Sm. 692.

(p) *Hall v. Hall*, 12 Beav. 414.

(q) See *Chavany v. Van Sommer*, cited 1 Swanst. 511, 512; in a note; *Burdon v. Barkus*, 4 De G. F. & J. 42; *Green v. Howell*, [1910] 1 Ch. 495.

(r) See *Scott v. Liverpool Corp.*, 3 De G. & J. 334.

(s) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.

(t) *Walworth v. Holt*, 4 Myl. & Cr. 619; cf. *Watney v. Trist*, 45 L. J. Ch. 412.

partnership effects (*u*). The accounts are usually directed to be taken (as has been already suggested) before a master, who examines the parties, if necessary, and requires the production of all the books, papers, and vouchers of the partnership, and he is armed from time to time, by the court, with all the powers necessary to effectuate the objects of the reference to him. If it is deemed expedient and proper, the court will restrain the partners from collecting the debts, or disposing of the property of the concern, and will direct the moneys of the firm received by any of them to be paid into court. In this way it adapts its remedial authority to the exigencies of each particular case (*x*).

§ 673. But, perhaps, one of the strongest cases to illustrate the beneficial operation of the jurisdiction of courts of equity in regard to partnership, was their power to dissolve the partnership during the term for which it was stipulated. This was a peculiar remedy which courts of common law were incapable of administering, by the nature of their organization, and has since been confirmed by section 35 of the Partnership Act, 1890 (53 & 54 Vict. c. 39). Such a dissolution may be granted, in the first place, on account of the insanity, or permanent mental incapacity, of one of the partners (*y*). In the next place it may be granted if the defendant partner becomes in any other way permanently incapable of performing his part of the partnership contract (*z*). In the next place, it may be granted on account of the gross misconduct of one or more of the partners, if the party applying for the dissolution is not the defaulter (*a*). But trifling faults of misbehaviour, which do not go to the substance of the contract, do not constitute sufficient ground to justify a decree for a dissolution (*b*). Another cause for a dissolution is a wilful and persistent breach of the articles by the defendant partner (*c*). So, if the business can only be carried on at a loss (*d*). The remaining ground is where circumstances have arisen which “render it just and equitable” that the partnership should be dissolved (*e*).

§ 673a. By the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 119, “where a person, being a member of a partnership firm, becomes

(*u*) *Featherstonehaugh v. Fenwick*, 17 Ves. 298; *Cook v. Collingridge*, 1 Jac. 607; *Rigden v. Pierce*, 6 Mad. 353.

(*x*) *Foster v. Donald*, 1 Jac. & Walk. 252; *Richardson v. Bank of England*, 4 M. & Cr. 165.

(*y*) Partnership Act, 1890, s. 35 (*a*); and *Anon.*, 2 K. & J. 441.

(*z*) Partnership Act, 1890, s. 35 (*b*); *Whitwell v. Arthur*, 35 Beav. 140.

(*a*) Partnership Act, 1890 s. 35 (*c*); *Essell v. Hayward*, 30 Beav. 222; *Price v. Cheesman*, 35 Beav. 142.

(*b*) *Goodman v. Whitcomb*, 1 J. & W. 589; *Anderson v. Anderson*, 25 Beav. 190.

(*c*) Partnership Act, 1890, s. 35 (*d*).

(*d*) Partnership Act, 1890, s. 35 (*e*); *Bailey v. Ford*, 13 Sim. 495.

(*e*) Partnership Act, 1890, s. 35 (*f*). See *Baring v. Dix*, 1 Cox 213; *Goodman v. Whitcomb*, 1 J. & W. 589; *Watney v. Wells*, 30 Beav. 56; *Leary v. Shout*, 33 Beav. 582.

lunatic," the judge exercising jurisdiction in lunacy "may, by order, dissolve the partnership."

§ 674. There were other considerations which made a resort to a court of equity, instead of a court of law, not only a more convenient, but even an indispensable, instrument for the purposes of justice. Thus, real estate may be bought and held for the purposes of the partnership, and really be a part of the stock in trade. The conveyance in such a case may be in the name of one, for the benefit of all the partners; or in the name of all, as tenants in common, or as joint-tenants (*f*). In case of the death of a partner, by which a dissolution takes place, the real estate might become severed at law from the partnership funds, and vest in the surviving partner exclusively, or in the heirs of a deceased partner, in common with the survivor, according to the particular circumstances of the case. In taking an account of the partnership effects at law, it was impossible for the court, for the benefit of creditors, to bring such real estate into the account; or to direct a sale of it; or to hold it a part of the partnership funds. It was perforce treated in courts of law just as its character was according to the common law. But in a court of equity, in such a case, the real estate was treated, to all intents and purposes, as a part of the partnership funds, whatever might be the form of the conveyance. For a court of equity considered the real estate, to all intents and purposes, as personal estate; and subjected it to all the equitable rights and liens of the partners, which would apply to it if it were personal estate. And this doctrine not only prevailed, as between the partners themselves and their creditors; but as between the representatives of the partners also. So that real estate, held in fee for the partnership, and as a part of its funds, upon the death of the partner intestate presumptively devolved upon his personal and not upon his real representative (*g*). This rule has now been confirmed by section 22 of the Partnership Act, 1890.

§ 675. The lien, also, of partners upon the whole funds of the partnership, for the balance finally due to them respectively, seems incapable of being enforced in any other manner than by a court of equity, through the instrumentality of a sale. Besides, the creditors of the partnership have the preference to have their debts paid out of the partnership funds, before the private creditors of either of the partners. On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything; which also can be accomplished only by the aid of a court of equity; for at law a joint creditor may proceed directly against the separate estate. This is another illustration of the doctrine of marshalling assets, and

(*f*) *Lake v. Craddock*, 3 P. Will. 158; *Wray v. Wray*, [1905] 2 Ch. 349.

(*g*) *Att.-Gen. v. Hubbuck*, 13 Q. B. D. 275.

proceeds upon analogous principles being worked out by the equity of the partners to be recouped, or their equitable liability to refund; and it is commonly applied in cases of insolvency, or bankruptcy (*h*). There are certain exceptions to the rule, which confirm, rather than abate, its force; as they stand upon peculiar reasons (*i*).

§ 676. In like manner, in cases of partnership debts, if one of the partners dies and the survivor becomes insolvent or bankrupt, the joint creditors have a right to be paid out of the estate of the deceased partner, through the medium of the equities subsisting between the partners (*k*). Indeed, a broader principle is now established; and it is held that bankruptcy is not necessary, in order to justify the creditors of the partnership in resorting to the assets of the deceased partner; and that such creditors may, in the first instance, proceed against the executor or administrator of the deceased partner, leaving him to his remedy over against the surviving partners; though, certainly, the surviving partners, in such a case, would be proper parties, if not necessary parties, to the suit (*l*). The learned author concluded from this that in equity all partnership debts were to be treated as joint and several, a position no longer maintainable (*m*). The true principle is that the Court of Chancery did not interfere with the creditor's right to levy execution on one of several judgment debtors, but gave the debtor who paid more than his fair share a remedy over against other judgment debtors. The principle is not restricted to partnership joint debts (*n*).

§ 677. In regard to partnership property, another illustration, of a kindred character, involving the necessity of an account, may be put to establish the utility and importance of equity jurisdiction. Until section 23 of the Partnership Act, 1890, restricted the right of a judgment creditor having a separate demand to a charging order upon his debtor's interest in the partnership assets, and a right to accounts and enquiries to ascertain what that interest was, a sheriff might levy upon the joint property of the partnership. In such a case, however, the creditor could levy, not the moiety or undivided share of his debtor in the property, as if there were no debts of the partnership, or lien on the same for the balance due to the other partner; but he could levy the interest only of his debtor, if any, in the property, after the payment of all debts and other charges thereon (*o*). In short, he could take only the same interest in the

(*h*) *Twiss v. Massey*, 1 Atk. 67; *Lodge v. Prichard*, 1 De G. J. & S. 610; *In re Head, Ex parte Head's Executors*, 1894, 1 Q. B. 638.

(*i*) *Campbell v. Mullett*, 2 Swanst. 551; *In re Bridgett, Cooper v. Adams* [1895] 2 Ch. 557.

(*k*) *Lodge v. Prichard*, 1 De G. J. & S. 610. See Partnership Act, 1890, s. 42.

(*l*) *Wilkinson v. Henderson*, 1 Myl. & K. 582.

(*m*) *Kendall v. Hamilton*, 4 App. Cas. 504. (*n*) *Sleech's Case*, 1 Mer. 529, 539.

(*o*) *West v. Skip*, 1 Ves. Sen. 239; *Dutton v. Morrison*, 17 Ves. 193; *Helmore v. Smith*, 35 Ch. D. 436.

property which the judgment debtor himself would have upon the final settlement of all the accounts of the partnership. When, therefore, the sheriff seized such property upon an execution, he seized only such undivided and unascertained interest; and if he sold under the execution, the sale conveyed nothing more to the vendee, who thereby became a tenant in common, than the rights and interests of the judgment debtor in the property seized (*p*). In truth, the sale did not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners; for that would be, to place him in a better situation than the partner himself. But it gave him, properly speaking, a right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which shall, upon the settlement of the account, be ascertained to exist. It is obvious, from what has been already stated, how utterly inadequate the means of a court of law were to take such an account. And, indeed, under a levy of this sort, it is not easy to perceive what authority a court of law had to interfere at all, to take an account of the partnership transactions; or by what process it could enforce it. In such a case, therefore, the proper remedy for the other partners, if nothing was due to the judgment debtor out of the partnership funds, was to file a bill in equity against the vendee of the sheriff, to have the proper accounts taken (*q*).

§ 679. Another illustration of the beneficial result of equity jurisdiction, in cases of partnership, may be found in the not uncommon case of two firms dealing with each other, where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the common law, in such cases, no suit could be maintained at law in regard to any transactions or debts between two firms; for, in such suit, all the partners must have joined, and have been joined; and no person could maintain a suit against himself, or against himself and others. The objection was at law a complete bar to the action. Nay, even after the death of the partner or partners, belonging to both firms, no action, upon any simple contract, or mutual dealing, *ex contractu*, was maintainable by the survivors of one firm against those of the other firm; for, in a legal view, there never was any subsisting contract between the firms; as a partner cannot contract with himself (*r*). If, however, the contract were by deed, the death of the common partner would have entitled the surviving partners of one firm to maintain an action of covenant against the surviving partners in the other (*s*).

(*p*) *West v. Skip*, 1 Ves. Sen. 239; *Skipp v. Harwood*, 2 Swanst. 586; *Chapman v. Koops*, 3 Bos. & Pul. 289; *Holmes v. Mentze*, 4 A. & E. 127; *Habershon v. Blurton*, 1 De G. and Sm. 121.

(*q*) *Chapman v. Koops*, 3 Bos. & Pul. 289; *Waters v. Taylor*, 2 Ves. & B. 300, 301; *Habershon v. Blurton*, 1 De G. & Sm. 121.

(*r*) *Bosanquet v. Wray*, 6 Taunt. 597; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Ellis v. Kerr* [1910] 1 Ch. 529.

(*s*) *Rose v. Poulton*, 2 B. & Ad. 822.

§ 680. But there never has been any difficulty in proceeding in courts of equity to a final adjustment of all the concerns of both firms, in regard to each other; for, in equity, it is sufficient, that all parties in interest are before the court as plaintiffs or as defendants; and they need not, as at law, in such a case, be on the opposite sides of the record. In equity, all contracts and dealings between such firms, of a moral and legal nature, are deemed obligatory, though void at law. Courts of equity, in all such cases, look behind the form of the transactions to their substance; and treat the different forms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies (*t*).

§ 681. Upon similar grounds, one partner cannot, at law, maintain a suit against his copartners, to recover the amount of money, which he has paid for the partnership; since he cannot sue them without suing himself, also, as one of the partnership. And, if one partner, in fraud of the partnership rights or credits, should release an action, that release would, at law, be obligatory upon all the partners. But a court of equity would not, under such circumstances, hesitate to relieve the partnership (*u*).

§ 682. Courts of equity, in this respect, act upon principles familiarly recognized in the civil law, and in the jurisprudence of those nations which derive their law from that most extensive source. This will abundantly appear, by reference to the known jurisprudence of Scotland, and that of the continental nations of Europe (*x*). Indeed, it would be a matter, not merely of curiosity, but of solid instruction (if this were the proper place for such an examination), to trace out the strong lines of analogy between the laws of partnership, as understood in England, and especially as administered in equity, and that of the Roman jurisprudence. Unexpected coincidences are everywhere to be found; while the differences are comparatively few; and, for the most part, these arise, rather from the different processes and forms of administering justice in different countries, than from any general diversity of principles (*y*). Among other illustrations, we may cite the general doctrine, that the partnership property is first liable to the partnership debts; that the right of any one partner is only to his share of the surplus; that joint creditors have a priority or privilege of payment before separate

(*t*) *Ex parte Sillitoe*, 2 L. J. O. S. Ch. 137; *Ex parte Castell*, 5 L. J. O. S. Ch. 71; *Piercey v. Fynney*, L. R. 12 Eq. 69.

(*u*) *Jones v. Yates*, 9 B. & C. 532; *Piercey v. Finney*, L. R. 12 Eq. 69.

(*x*) See 2 Bell, Com. B. 7, ch. 2, § 2, art. 1214.

(*y*) To establish this statement, the learned reader may be referred to the Digest, Lib. 17, tit. 2, *Pro Socio*; and Voet, Com. ad. id.; Vinnius, Com. Inst. Lib. 3, tit. 26. 1 Domat, Civil Law, tit. *Partnership*, B. 1, tit. 8, *per tot.*; 2 Bell, Com. 4, ch. 2, arts. 1250 to 1263; Code Civil of France, arts. 1832 to 1873; Pothier, *Traité de Société*, *per tot.*

creditors (z); and that the estates of deceased partners are liable to contribute towards the payment of the joint debts (a).

§ 683. This review of some of the more important cases in which courts of equity interfere in regard to partnerships, does (unless my judgment greatly misleads me) establish, in the most conclusive manner, the utter inadequacy of courts of law to administer justice in most cases, growing out of partnerships, and the indispensable necessity of resorting to courts of equity, for plain, complete, and adequate redress. Where a discovery, on account, a contribution, an injunction, or a dissolution is sought, in cases of partnership, or even where a due enforcement of partnership rights, and duties, and credits, is required, it is impossible not to perceive, that, generally, a resort to courts of law would be little more than a solemn mockery of justice. Hence, it can excite no surprise, that courts of equity now exercise a full concurrent jurisdiction with courts of law in all matters of partnership; and, indeed, it may be said, that, practically speaking, they exercise an exclusive jurisdiction over the subject in all cases of any complexity or difficulty.

(z) 1 Domat, B. 1, tit. 8, § 3, art. 10.

(a) *Ibid.* § 6, arts. 1, 2; Pothier, *Traité de Société*, nn. 96, 136, 161, 162.

CHAPTER XVI.

PECULIAR REMEDIES IN EQUITY—CANCELLATION AND DELIVERY OF INSTRUMENTS.

§ 688. WE shall now proceed to the consideration of the other branch of concurrent jurisdiction, that in which the peculiar remedies afforded by courts of equity constitute the principal, although not the sole, ground of jurisdiction.

§ 692. One head of equity jurisdiction embraces that large class of cases, where the RESCISSION, CANCELLATION, or DELIVERY UP of agreements, securities, or deeds is sought, or a SPECIFIC PERFORMANCE is required of the terms of such agreements, securities, or deeds, as indispensable to reciprocal justice. It is obvious that courts of law are utterly incompetent to make a specific decree for any relief of this sort (*a*); and, without it, the most serious mischiefs may often arise to the parties interested. The subject naturally divides itself into two great branches. In the first place, what are the cases in which courts of equity will undertake to rescind, cancel, or direct a surrender of contracts, securities, and deeds? And, in the second place, what are the cases in which courts of equity will enforce a specific performance of them?

§ 693. Before proceeding to the consideration of these distinct and important subjects, it may be proper to suggest, that the application to a court of equity for either of these purposes is not, strictly speaking, a matter of absolute right, upon which the court is bound to pass a final judgment. But it is a matter of sound discretion, to be exercised by the court, either in granting or in refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case (*b*). Thus, for instance, a court of equity will sometimes refuse to order a specific performance of an agreement, which it will yet decline to order to be delivered up, cancelled, or rescinded (*c*). On the other hand, a specific performance will be ordered upon the application of one party when it would be denied upon the application of the other. And an agreement will be rescinded or cancelled upon the application of one party, when the court would decline any interference at the instance of the other (*d*).

(*a*) *Bromley v. Holland*, 7 Ves. 3; *Simpson v. Lord Howden*, 3 M. & Cr. 97.

(*b*) *Mortlock v. Buller*, 10 Ves. 292.

(*c*) *Mortlock v. Buller*, 10 Ves. 292; *Turner v. Harvey*, Jac. 178.

(*d*) *Cooke v. Clayworth*, 18 Ves. 12. See § 206.

So that we are here to understand, that the interference of a court of equity is a matter of mere discretion; not, indeed, of arbitrary and capricious discretion, but of sound and reasonable discretion, *secundum arbitrium boni judicis* (e). And in all cases of this sort, where the interposition of a court of equity is sought, the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require; and, if the plaintiff refuses to comply with such terms, his bill will be dismissed (f). The maxim here is emphatically applied—He who seeks equity must do equity.

§ 693a. By the 34th section of the Judicature Act, 1873, it is provided that the jurisdiction as to the rectification, the setting aside, and the cancellation of deeds and other written instruments, shall be assigned to the Chancery Division of the High Court.

§ 694. In the first place, then, let us consider in what cases the court will direct the Delivery up, Cancellation, or Rescission of agreements, securities, deeds, or other instruments. It is obvious that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. If, therefore, the instrument was void for matter apparent upon the face of it, there was no call to exercise the jurisdiction, with the possible exception of instruments forming a clause upon the title to land (g). The party is relieved upon the principle, as it is technically called *quia timet*; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest. We have already had occasion to take notice of a great variety of cases, in which agreements, securities, deeds, and other instruments have been set aside, and decreed to be delivered up, on the ground of accident, mistake, and fraud (h). Under the two former heads, it will readily be perceived, upon the slightest examination, that a rescission, or cancellation of the agreements, securities, deeds, or other instruments, would not, in a great many cases, be an appropriate, adequate, or equitable relief. The accident or mistake may be of a nature which does not go to the very foundation and merits of the agreement; but may only require that some amendment, addition, qualification, or variation should take place, to make it at once just and reasonable and fit to be enforced. But it can rarely be said that, in cases of fraud, actual or constructive, the same observations properly apply.

(e) *Buckle v. Mitchell*, 18 Ves. 111; *Revell v. Hussey*, 2 Ball & B. 288; *Eastern Counties Ry. v. Hawkes*, 5 H. L. C. 331; *Haywood v. Cope*, 25 Beav. 140.

(f) *Earl of Aldborough v. Tyre*, 7 Cl. & F. 436; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Bank of Montreal v. Stuart*, [1911] A. C. 120.

(g) *Bromley v. Holland*, 7 Ves. 3; *Simpson v. Lord Howden*, 3 M. & Cr. 97.

(h) *Willan v. Willan*, 16 Ves. 72; *Ball v. Storie*, 1 Sim. & St. 210; *Metropolitan, &c., Soc. v. Brown*, 26 Beav. 454.

If there is actual fraud, there seems the strongest ground for the interference of a court of equity to rescind a contract, security, or other instrument. And if the fraud be constructive, still, for the most part, it ought to draw after it the same consequences, either as a breach of trust, or an abandonment of duty or a violation of public policy. But although fraud may, in all these cases, furnish a sufficient ground to rescind a contract *in jure strictissimo*; yet there may be circumstances which may justly mitigate the rigid severity of the law; or may place the parties *in pari delicto*; or may require a court of equity, from the demerit of the plaintiff in the particular transaction, to abstain from the slightest interference; or may even induce it, if it should rescind the contract, to do so only upon the terms of due compensation, and the allowance of the countervailing equities of the plaintiff (i).

§ 695. Without attempting to go over the different classes of cases of fraud (which have been already enumerated), it may be stated, that courts of equity will generally set aside, cancel, and direct to be delivered up, agreements and other instruments, however solemn in their form of operation, where they are voidable, and not merely void, under the following circumstances: First, where there is actual fraud in the party defendant, in which the party plaintiff has not participated (k). Secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein (l). Thirdly, where there is a fraud against public policy, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand (m). Fourthly, where there is a constructive fraud by both parties, but they are not *in pari delicto* (n). And lastly, where since the execution of the instrument a state of things has arisen quite different from that contemplated by the instrument, and rendering it inoperative in the future (o).

§ 696. But in many cases, where the instrument is declared void by positive law, and also, where it is held void or voidable upon other principles, courts of equity will impose terms upon the party, if the circumstances of the case require it. Thus, before the repeal of the usury laws, courts of equity would not interpose in favour of the borrower, except upon the payment or allowance of the debt fairly due and interest at the legal rate (p); and a similar principle is applied

(i) *Ante*, § 50; *Holbrook v. Sharpey*, 19 Ves. 131.

(k) *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64; *Adam v. Newbigging*, 13 App. Cas. 308.

(l) *Hugerenin v. Baseley*, 7 Ves. 273.

(m) *Williams v. Bayley*, L. R. 1 H. L. 200.

(n) *Bromley v. Holland*, 7 Ves. 3; *Saunders v. Newbold* [1905], 1 Ch. 260; *affd. nom. Samuel v. Newbold* [1906], A. C. 461.

(o) *McDonnell v. Hesilrige*, 16 Beav. 346; *Bond v. Walford*, 32 Ch. D. 238.

(p) *Scott v. Nesbit*, 4 Bro. C. C. 641.

where a catching bargain with an heir or expectant is challenged (*q*). So, in cases of the setting aside and cancellation, and delivery up of annuity securities because they were not duly registered, courts of equity would direct an account of all receipts and payments on each side, and require the just balance to be paid by the proper party (*r*). And similar principles are applied to other cases, where the transaction is deemed indefensible, and yet there is an equitable right to compensation.

§ 697. On the other hand, where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud; or where the agreement, which he seeks to set aside, is founded in illegality, immorality, or base and unconscionable conduct on his own part; in such cases courts of equity will leave him to the consequences of his own iniquity; and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best interests and morals of social life (*s*). And if acts of this sort have been deliberately done under circumstances in which innocence has been betrayed, or confidence seduced, or falsehood or concealment systematically practised, *à fortiori*, courts of equity could not, without straining the administration of justice, interfere to save the party from the just results of his own gross misconduct, when the failure of success in the scheme would manifestly be the sole cause of his praying relief.

§ 698. A question has often occurred how far courts of equity would or ought to interfere to direct deeds and other solemn instruments to be delivered up and cancelled, which are utterly void, and not merely voidable. The doubt has been, in the first place, whether, as an instrument utterly void is incapable of being enforced at law, it is not a case where the remedial justice to protect the party may not be deemed adequate and complete at law, and therefore where the necessity for the interposition of courts of equity is obviated. And, in the next place, whether, if the instrument be void, and ought not to be enforced, the more appropriate remedy in a court of equity would not be, to order a perpetual injunction to restrain the use of the instrument, rather than to compel a delivery up and cancellation of the instrument.

§ 700. But whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest. If the instrument is void for matter apparent upon the face of the instrument, the intervention of a court

(*q*) *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484.

(*r*) *Bromley v. Holland*, 7 Ves. 3.

(*s*) *Brackbury v. Brackbury*, 2 J. & W. 391; *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

of equity is unnecessary and now no longer exercised (*t*). But if the illegality be not so apparent, and the instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person (*u*). If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title (*x*). If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost or obscured, or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment (*y*). But the proper course in such a case is to resort to proceedings to perpetuate testimony (*z*).

§ 701. The whole doctrine of courts of equity on the subject hitherto discussed is referable to the general jurisdiction which it exercises in favour of a party *quia timet*. It is confined strictly to cases where the instrument, having been executed, is inherently void upon grounds of law or equity; and not where the objection arises by matter subsequent to the execution of the instrument (*a*).

§ 703. But the jurisdiction of courts of equity to decree a delivery up or cancellation of deeds or other instruments; is not limited to cases in which some inherent defect in their original character renders them either voidable or void. On the contrary, its remedial justice is often and most beneficially applied, by affording specific relief, in cases of unexceptionable deeds and other instruments, in favour of persons who are legally entitled to them (*b*). This, indeed, is a very old head of equity jurisdiction, and has been traced back to so early a period as the reign of Edward IV. (*c*). It is a most important branch of equity jurisprudence; and is exerted, in all suitable cases of a public or private nature, in favour of persons entitled to the custody and possession of deeds and other writings. Thus, heirs-at-law, devisees, and other persons, entitled to the custody and possession of the title-deeds of their respective estates, may, if they are detained or withheld from them, obtain a judgment for a specific delivery of them (*d*). The same

(*t*) *Simpson v. Lord Howden*, 3 M. & Cr. 97.

(*u*) *Williams v. Bayley*, L. R. 1 H. L. 200.

(*x*) *Pierce v. Webb*, 3 Bro. C. C. 16 n.; *Onions v. Cohen*, 2 H. & M. 354.

(*y*) *Bromley v. Holland*, 7 Ves. 3, 20, 21; *Peake v. Highfield*, 1 Russ. 559; *Duncan v. Worrall*, 10 Price 31.

(*z*) *Brooking v. Maudsley*, 38 Ch. D. 636.

(*a*) *Duncan v. Worrall*, 10 Price 31; *Thornton v. Knight*, 16 Sim. 509.

(*b*) *Brown v. Brown*, 1 Dick. 62; *Gibson v. Ingo*, 6 Hare, 112.

(*c*) *Armitage v. Wadsworth*, 1 Mad. 192.

(*d*) *Duncombe v. Mayer*, 8 Ves. 320; *Leathes v. Leathes*, 5 Ch. D. 221; *Ind*,

doctrine applies to other instruments and securities, such as bonds, negotiable instruments, and other evidences of property, which are improperly withheld from the persons, who have an equitable or legal interest in them (e); or who have a right to have them preserved. This redress a court of common law was incapable of affording, since the prescribed forms of its remedies rarely enable it to pronounce a judgment *in rem*, in such cases, which is, or can be made, effectual. It is true that an action of replevin might in some few cases lie, and give the proper remedy, if the thing could be found, and in that event a court of equity disclaimed jurisdiction as there was a sufficient remedy at the common law (f). But in an action of detinue there was no effective judgment *in rem* at the common law until the passing of the Mercantile Law Amendment Act, 1856, the statutory provisions being now embodied in sect. 52 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and R. S. C., 1883, Order XLVIII, rule 1 (g). And generally in other actions at law, damages only were recoverable; and such a remedy must, in many cases, be wholly inadequate (h). This constitutes the true ground for the prompt interposition of courts of equity for the recovery of the specific deeds or other instruments.

§ 704. Upon similar principles, persons having rights and interests in real estate are entitled to come into equity for the purpose of having an inspection and copies of the deeds under which they claim title (i). And in like manner, remaindermen, and reversioners, and other persons, having limited or ulterior interests in real estate, have a right in many cases to come into equity, to have the title-deeds secured for their benefit (k) or their interests otherwise secured. But in all such cases the court will exercise a sound discretion as to giving judgment; for it is by no means an absolute right of the party to have the title-deeds in all cases secured, or brought into chancery for preservation. If such a practice was suffered universally to prevail, the title-deeds of half the estates in the country might be brought into court. To entitle the party, therefore, to seek relief, it must clearly appear that there is danger of a loss or destruction of the title-deeds in the custody of the persons possessing them; or the court has to undertake the administration of the property; or the person possessing them has incumbered his interest (l).

Coope & Co. v. Emmerson, 12 App. Cas. 300. See *In re Newen*, *Newen v. Barnes*, [1894] 2 Ch. 297.

(e) *Gibson v. Ingo*, 6 Hare, 112; *Williams v. Bayley*, L. R. 1 H. L. 200.

(f) See *Shaw v. Earl Jersey*, 4 C. P. D. 359.

(g) *Phillips v. Jones*, 15 Q. B. 859; *Ex parte Drake*, in *re Ware*, 5 Ch. D. 866.

(h) *Fells v. Read*, 3 Ves. 70; *Dowling v. Betjermann*, 2 J. & H. 544.

(i) *Lambert v. Rogers*, 2 Mer. 489; *Hercy v. Ferrers*, 4 Beav. 97; *Davis v. Earl of Dysart*, 20 Beav. 405; *Pennell v. Earl of Dysart*, 27 Beav. 542; *Brown v. Wales*, L. R. 15 Eq. 142.

(k) *Jenner v. Morris*, L. R. 1 Ch. 603; *Stanford v. Roberts*, L. R. 6 Ch. 307.

(l) *Leathes v. Leathes*, 5 Ch. D. 223; *Ex parte Rogers*, 26 Ch. D. 31; *In re Newen*, *Newen v. Barnes* [1891] 2 Ch. 297.

§ 704*a*. A party may have covenanted to produce deeds or have given a statutory acknowledgment to the like purpose, under sect. 9 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), these covenants or undertakings may be enforced specifically against the party in possession of the muniments, but stand upon a different footing to the general jurisdiction exercised where no contract exists.

§ 705. Cases also may occur, where a deed, or other instrument, originally valid, has, by subsequent events, such as by satisfaction or payment, or other extinguishment of it, legal or equitable, become *functus officio*; and yet, its existence may be either a cloud upon the title of the other party, or subject him to the danger of some future litigation when the facts are no longer capable of complete proof, or have become involved in the obscurities of time (*m*). Under such circumstances, although the deed or other instrument has become a nullity, yet courts of equity will interpose, upon the like principles, to prevent injustice, and will decree a delivery and cancellation of the instrument. This, indeed, is a very old head of equity; and traces of it are to be found in some of our earliest reports (*n*).

§ 705*a*. A debt can only be released in equity if there exists a valid consideration or an instrument under seal (*o*), or if the creditor appoints his debtor executor and manifests, even informally, a wish to forgive the debt (*p*). Now a valuable consideration does not require a benefit to the promiser, it is sufficient that the promisee performs some act required of him by the promiser. Accordingly, if the debtor can show that he has been induced to alter his position by reason of some informal promise by the creditor to forgive the debt, in terms compatible with a present gift (*q*), the debtor is entitled to a cancellation or return of any security which he may have given to his creditor (*r*).

§ 706. There is also a curious case of an analogous nature, which was finally decided by the House of Lords, in which the powers of a court of equity were applied to give relief to an extent which no court of law would for a moment have entertained. The testator, on his death-bed, said to his executrix, that he had the bond of B., but when he died B. should have it, and that he should not be asked or troubled for it. The executrix, after the death of the testator, put the bond in suit; and thereupon, B. brought a bill for a discovery, and delivery up, and cancellation of the bond. And it was decreed accordingly at the hearing by the Lord Chancellor, and his decree was affirmed by the

(*m*) *Flower v. Marten*, 2 M. & Cr. 459; *Bond v. Walford*, 32 Ch. 238.

(*n*) Cary, 17; *ante*, § 700.

(*o*) *Cross v. Sprigg*, 6 Hare, 552; *Peace v. Hains*, 11 Hare, 151; *Gee v. Liddell*, 35 Beav. 629.

(*p*) *Strong v. Bird*, L. R. 18 Eq. 315; *In re Pink, Pink v. Pink* [1912] 2 Ch. 528.

(*q*) See *Smith v. Warde*, 15 Sim. 56; *In re Pink, Pink v. Pink* [1912] 2 Ch. 528.

(*r*) *Aston v. Pye*, cited 5 Ves. at p. 350; *Flower v. Marten*, 2 M. & Cr. 459.

House of Lords (s). This case carries the doctrine of an implied trust or equitable extinguishment of a debt to the very verge of the law. The case would be clearly unsupportable as a *donatio mortis causâ* as there was no actual tradition; and it must stand upon the parol evidence to establish a trust to have the bond delivered up, not touched or provided for by the testator's will (t).

§ 706a. Whether all the cases referable to this branch of equity are strictly maintainable or not, having regard to the cases which decide that the Court of Chancery would not enforce voluntary contracts, or assist the donee or assignee where the gift or assignment *inter vivos* was voluntary, is a topic which affords some difficulty to the student, until he is taught or reminded that there is another class of case where the donor or assignor has done all that is possible to divest himself of any beneficial interest in favour of some named or ascertainable person; in other words, has constituted himself a trustee for some other or others (u). The cases are all reconcilable in point of law, the difficulty is caused in applying well settled principles to divergent facts, and the inferences that different minds will draw from particular premises.

§ 706b. The topics discussed suggest a class of cases which occupy some space in the reports, viz., the setting aside of voluntary deeds and settlements. So far as can be judged relief in these cases has only been granted where the settlor is a person incapable of forming a sane conclusion by reason of mental infirmities inherent or the result of advanced years. Judges have no doubt in many cases given wrong reasons for a wise conclusion. In so doing they have only illustrated the undoubted fact that like other mortals they are not infallible (x). This much is clear *cujus est dare ejus est disponere*, therefore a power of revocation need not be inserted in a voluntary settlement, for that would be tantamount to saying that a man cannot give what is his own. The matter was finally disposed of by the full Court of Appeal in Chancery (y). Nor is the fact that the deed contains absurd and improvident provisions more than a circumstance of evidence that a document is not a deliberate expression of intention (z). The party impeaching the validity of an instrument must establish his case, *omnia rite esse acta presumuntur* (a). The representatives of a party

(s) *Wekett v. Raby*, 2 Bro. P. C. by Tomlins, 386.

(t) See *Chamberlaine v. Chamberlaine*, 2 Freem. 34; *Reech v. Kennigate*, Ambler 67, S. C. 1 Ves. Sen. 123.

(u) *Kekewich v. Manning*, 1 De G. M. & G. 176; *Cochrane v. Moore*, 25 Q. B. D. 57.

(x) "Even a Lord Chancellor may possibly make a mistake," Lord Macnaghten, *Hatton v. Harris* [1892], A. C. 547, 564.

(y) *Hall v. Hall*, L. R. 8 Ch. 430.

(z) *Dutton v. Thompson*, 23 Ch. D. 278.

(a) *Henry v. Armstrong*, 18 Ch. D. 668; *Tucker v. Bennett*, 38 Ch. D. 1.

entitled to rectify an instrument enjoy the same right after his death (b).

§ 707. In all these cases, where a delivery up or cancellation of deeds or other instruments is sought, either upon the ground of their original invalidity or of their subsequent satisfaction, or because the party has a just title thereto or derives an interest under them, courts of equity act upon an enlarged and comprehensive policy; and, therefore, in granting the relief, they will impose such terms and qualifications as shall meet the just equities of the opposing party. Thus, for instance, if the heir-at-law seeks a discovery and delivery of the title-deeds of the estate of his ancestor against a jointress, he will not be allowed the relief unless upon the terms of confirming her jointure (c). Cases of this sort afford a very frequent illustration of the maxim, that he who seeks the aid of equity must do equity.

§ 708. There yet remains another class of cases in which the remedial power of courts of equity was applied to compel a specific delivery of the thing to which another person had a clear right. We here allude to the jurisdiction to entertain actions for the delivery of specific chattels. Ordinarily, in cases of chattels, courts of equity did not interfere to decree a specific delivery, because by an action at law a full compensation could be obtained in damages, although the thing itself could not be specifically obtained before the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), which, by sect. 2, conferred a right upon common law courts to compel specific delivery of goods. These provisions have been replaced by sect. 52 of the Sale of Goods Act, 1892 (56 & 57 Vict. c. 71), which confers a discretionary power to enforce specifically a contract to deliver specific or ascertained goods. Where the remedy at law was perfectly adequate and effectual to redress the injury, there was no reason why courts of equity should afford any aid to the party (d). Indeed, it may be truly said, that the value of goods and merchandise varies so much at different times that it might not unfrequently be inequitable to decree a specific performance of contracts respecting them, since it might be wholly disproportionate to the injury sustained. Where the seller has contracted to sell chattels to the plaintiff and further that he will not sell them to any one else, although the court might not enforce the contract so as to compel specific delivery, it would prevent a sale in breach of the negative stipulation by injunction (e), and a person knowing the terms of the contract could derive no benefit from the breach (f).

(b) *Anderson v. Elsworth*, 3 Giff. 154.

(c) *Towers v. Davys*, 1 Vern. 479; *Petre v. Petre*, 3 Atk. 511.

(d) *Buxton v. Lister*, 3 Atk. 383; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Dominion Coal Co. v. Dominion Steel and Iron Co.* [1909], A. C. 293.

(e) *Donnell v. Bennett*, 22 Ch. D. 835.

(f) *Beech v. Ford*, 7 Hare, 208; *De Mattos v. Gibson*, 4 De G. & J. 276; *National Phonograph Co. v. Edison Bell National Phonograph Co.* [1908] 1 Ch. 335.

§ 709. But there are cases of personal goods and chattels in which the remedy at law by damages would be utterly inadequate, and leave the injured party in a state of irremediable loss. In all such cases courts of equity would interfere, and grant full relief by requiring a specific delivery of the thing which was wrongfully withheld. This may occur where the thing is of a peculiar value and importance, and the loss of it cannot be fully compensated in damages when withheld from the owner, and then relief will be granted in equity (*g*). Thus, where the lord of a manor was entitled to an old altar-piece, made of silver, and remarkable for a Greek inscription and dedication to Hercules, as treasure-trove within his manor, and it had been sold by a wrongdoer, it was decreed to be delivered up to the lord of the manor, as a matter of curious antiquity, which could not be replaced in value, and which might, by being defaced, become greatly depreciated (*h*). So, where an estate was held by the tenure of a horn, and a bill was brought by the owner to have it delivered up to him, it was held maintainable, for it constituted an essential muniment of his title (*i*). The same rule has been applied to a box of jewels (*k*). The same principle applies to any other chattel whose principal value consists in its antiquity; or its being the production of some distinguished artist; or in its being a family relic, ornament, or heirloom; such, for instance, as ancient gems, medals, and coins; ancient statues and busts; paintings of old and distinguished masters; and even those of a modern date, having a peculiar distinction and value, such as family pictures and portraits and ornaments, and other things of a kindred nature (*l*). In some instances a fiduciary relation has existed between the parties, and this is regarded as an additional reason for the exercise of the equitable jurisdiction to decree specific delivery (*m*).

§ 710. There are other cases, where courts of equity have interfered to decree a specific delivery of chattels under an agreement of sale, or for an exclusive possession and enjoyment for a term of years. But all these cases stand upon very peculiar circumstances, where the nature of the remedy at law is inadequate to complete redress; or where some other ingredients of equity jurisdiction are mixed up in the transaction, such as the necessity of interference to prevent multiplicity of suits, or irreparable mischief (*n*). Thus, for instance, where, on the dissolution of a partnership, an agreement was made that a particular book used in the trade should be considered the exclusive property of one of the partners, and that a copy of it should

(*g*) *Fells v. Read*, 3 Ves. 70.

(*h*) *Duke of Somerset v. Cookson*, 3 P. Will. 390.

(*i*) *Pusey v. Pusey*, 1 Vern. 273.

(*k*) *Saville v. Tankred*, 1 Ves. Sen. 101, Belt's Suppl. 70.

(*l*) *Fells v. Read*, 3 Ves. Jun. 70.

(*m*) *Wood v. Rowcliffe*, 3 Hare, 304, affd. 2 Ph. 382; *Pooley v. Rudd*, 14 Beav. 34.

(*n*) See *Nutbrown v. Thornton*, 10 Ves. 159; *Thompson v. Harcourt*, 1 Bro. P. C. 193; *Arundell v. Phipps*, 10 Ves. 139; *Lloyd v. Loaring*, 6 Ves. 773.

be given to the other, a specific performance of the agreement was decreed as to the copy; for it is clear, that at law no adequate redress could have been obtained (*o*). So, a decree was made against a lessee of alum-works, to prevent an apprehended breach of a covenant, to leave a certain amount of stock on the premises at the expiration of the term; there being ground of suspicion that he did not mean to perform the covenant (*p*). So, a decree was made against a landlord, to restore to a tenant certain farm stock taken by the former in violation of the terms of his contract (*q*). These cases all proceed upon the same principle of *quia timet*, and the danger of irreparable mischief (*r*).

§ 711. And formerly, where the court would not decree a specific performance and delivery of chattels, it would yet entertain the suit to decree compensation against the party for his omission to perform his contract. Thus, for instance, where there was a contract for the delivery of specific stock, the court refused to decree a specific performance, but, at the same time, entertained the bill for the purpose of giving compensation for the non-delivery (*s*). But this subject will naturally come more properly under review in the succeeding chapter.

(*o*) *Lingen v. Simpson*, 1 Sim. & Stu. 600.

(*p*) *Ward v. Duke of Buckingham*, cited 10 Ves. 161.

(*q*) *Nutbrown v. Thornton*, 10 Ves. 159.

(*r*) *Nutbrown v. Thornton*, 10 Ves. 159.

(*s*) *Cud v. Rutter*, 1 P. Will. 570, and Cox's notes (2 and 3).

CHAPTER XVII.

SPECIFIC PERFORMANCE OF AGREEMENTS AND OTHER DUTIES.

§ 712. HAVING thus gone over some of the principal grounds upon which courts of equity will interpose to decree the rescission, cancellation, or delivery up of agreements, securities, and other instruments, and the delivery of chattels to the rightful owners, we shall in the next place pass to the consideration of the other branch of our inquiries; namely, what are the cases in which courts of equity will interpose and decree a specific performance of agreements?

§ 713. With reference to the present subject, agreements may be divided into three classes: (1) those which respect personal property; (2) those which respect personal acts; and (3) those which respect real property. And we shall presently see, that the jurisdiction now actually exercised by courts of equity is not co-extensive in all these classes of cases, but at the same time it may be fairly resolved into the same general principles.

§ 714. It is well known that by the common law every contract or covenant to sell or transfer a thing, if there was no actual transfer, was treated as a mere personal contract or covenant; and, as such, if it remained unperformed by the party, no redress could be had, except in damages; this was in effect, in all cases, allowing the party the election either to pay damages, or to perform the contract or covenant at his sole pleasure. But courts of equity deemed such a course in many instances inadequate for the purposes of justice; and, considering it a violation of moral and equitable duties, they did not hesitate to interpose, and require from the conscience of the offending party a strict performance of what he could not, without manifest wrong or fraud, refuse.

§ 715. The jurisdiction of courts of equity to decree a specific performance of contracts, is not dependent upon, or affected by, the form or character of the instrument. What these courts seek to be satisfied of is, that the transaction in substance amounts to, and is intended to be, a binding agreement for a specific object, whatever may be the form or character of the instrument. Thus, if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events and not to be discharged by the payment of the penalty, although it has assumed the form

of a condition only (a). Courts of equity, in all cases of this sort, look to the substance of the transaction, and the primary object of the parties; and where that requires a specific performance, they will treat the penalty as a mere security for its due performance and attainment.

§ 716. The jurisdiction of courts of equity to decree a specific performance of agreements, is certainly of a very ancient date, if it be not coeval with the existence of these courts in England. It may be distinctly traced back to the reign of Edward IV.; for, in the Year Book of 8th Edward IV. 4b, it was expressly recognized by the Chancellor as a clear jurisdiction. But the particular instance given there *arguendo* and assented to by the Chancellor is a promise to build a house. This jurisdiction was exercised so late as 1740 (b) to the fullest extent; but although not disclaimed in its entirety at the present day, it is only exercised within such narrow limits that it is practically non-existent (c). Whatever may be the origin and antiquity of the jurisdiction to decree a specific performance, it is now clearly established, and is in daily and most beneficial exercise for the purposes of justice. The ground of the jurisdiction is, that a court of law is incompetent to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. Wherever, therefore, the party wants the thing in *specie*, and he cannot otherwise be fully compensated, courts of equity will generally grant him a specific performance (d).

§ 717. And this constitutes the true and leading distinction in the present exercise of equity jurisdiction in regard to decreeing specific performance. It does not proceed (as is sometimes erroneously supposed) upon any distinction between real estate and personal estate; but upon the ground, that damages at law may not, in the particular case, afford a complete remedy (e). Thus, courts of equity will decree performance of a contract for land, not because of the particular nature of land, but because the damages at law, which must be calculated upon the general value of land, may not be a complete remedy to the purchaser, to whom the land purchased may have a peculiar and special value (f). So, courts of equity would not generally decree performance of a contract for the sale of stock or goods; not because of their personal nature, but because the damages at law, calculated on the market-price of the stock or goods, are as

(a) *Logan v. Wienholt*, 1 Cl. & F. 611; *French v. Macale*, 2 Dru. & War. 269; *Jones v. Heavens*, 4 Ch. D. 636; *National Provincial Bk. v. Marshall*, 40 Ch. D. 112.

(b) *Pembroke v. Thorpe*, 2 Swanst. 437 n.

(c) *Wolverhampton (Corp.) v. Emmons* [1901] 1 K. B. 515.

(d) *Doloret v. Rothschild*, 1 Sim. & Stu. 590; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Eastern Counties Ry. v. Hawkes*, 5 H. L. C. 331.

(e) *Adderley v. Dixon*, 1 Sim. & Stu. 607.

(f) *Hall v. Warren*, 9 Ves. 605; *Eastern Counties Ry. v. Hawkes*, 5 H. L. C. 331.

complete a remedy for the purchaser, as the delivery of the stock or goods contracted for; inasmuch as with the damages he may ordinarily purchase the same quantity of the like stock or goods (g).

§ 718. But although the general rule now is, not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, *choses in action*, and other things of a merely personal nature; yet the rule is (as we have seen) a qualified one, and subject to exceptions; or, rather, the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. Instances have already been given (h) and may be supplemented by the following illustrative cases: A foreign ship in an English port, where the owner was abroad, and not amenable to the jurisdiction of the English courts (i); or goods exportable duty free, none other enjoying the same privilege being available (k).

§ 719. Lord Hardwicke has himself put the case of a shipbuilder contracting for the purchase of a great quantity of timber, by reason of the vicinity of the timber, and this may be well known and understood on the part of the seller, in which case a specific performance might be indispensable to justice (l). It was held by Vice-Chancellor Kindersley, in *Falcke v. Gray* (m), that specific performance of a contract for the sale of a chattel will be decreed where pecuniary damages would not be an adequate compensation, as where the article is of unusual distinction and curiosity, and of doubtful value. And in another more recent case (n), it was said the courts of equity have jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, and the legal remedy being inadequate.

§ 720. Other illustrations may be found in cases, not merely of sales, but of matters peculiarly resting in contracts of a very different nature. Thus, where a covenant was made in a lease of some alum-works, to leave certain stock upon the premises, a specific performance was decreed; because the trade would be greatly damaged if the covenant were not specifically performed, contrary to the real justice of the case between the parties, and the landlord had stipulated for a sort of enjoyment of the premises after the expiration of the lease (o).

§ 721. Of the like nature are the common cases of covenants between landlords and tenants, where injunctions, in the nature of a

(g) *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

(h) *Ante*, § 708.

(i) *Hart v. Herwig*, L. R. 8 Ch. 860.

(k) See *Hughes v. Græme*, 33 L. J. Q. B. 335.

(l) *Buxton v. Lister*, 3 Atk. 384, 385.

(m) *Falcke v. Gray*, 1 Drew. 651.

(n) *Dowling v. Betjemann*, 2 J. & H. 544.

(o) *Ward v. Duke of Buckingham*, cited 10 Ves. 161.

specific performance, are often decreed; as, for instance, covenants not to remove manure or crops at the end of a lease; covenants not to plough meadow; covenants not to dig gravel, sand, or coal. In all cases of this sort, although the court acts merely by injunction, to prevent the breach of the particular covenant, it in effect secures thereby a specific performance; and it may at once be seen, that such interposition is indispensable to prevent irreparable mischief (*p*).

§ 722. Cases of agreements to form a partnership, and to execute articles accordingly, may also be specifically decreed, although they relate exclusively to chattel interests; if no adequate compensation can, in such cases, be made at law (*q*). Upon the like ground courts of equity will decree the specific performance of a covenant to grant a lease, or to renew a lease (*r*); so, of a contract for the sale of the goodwill of a trade, and of a valuable secret connected with it (*s*); so, of a contract to keep the banks of a river or canal in repair (*t*); so, of a contract for the sale of an annuity payable out of the dividends of stock (*u*); so, of a contract for the sale of debts proved under a commission of bankruptcy, where an assignment of the debt had not been already executed (*x*); so, if a party covenants that he will not carry on his trade within a certain distance or in a certain place, within which the other party carries on the same trade, a court of equity will restrain the party from breaking the agreement so made, if valid (*y*). In each of these cases, the judgment operates, *pro tanto*, as a specific performance.

§ 723. Where the specific performance of a contract respecting chattels will be decreed upon the application of one party, courts of equity will maintain the like suit at the instance of the other party, although the relief sought by him is merely in the nature of a compensation in damages or value; for, in all such cases, the court acts upon the ground that the remedy, if it exists at all, ought to be mutual and reciprocal, as well for the vendor as for the purchaser (*z*).

§ 724. Although the doctrine seems well settled, that a contract for the sale of government stock will not now be ordered to be

(*p*) *City of London v. Pugh*, 4 Bro. P. C. 395; *Kimpton v. Eve*, 2 Ves. & B. 349; *Pratt v. Brett*, 2 Madd. 62; *French v. Macale*, 2 Dru. & War. 269.

(*q*) See *ante*, §§ 666-668a.

(*r*) *Earl of Shelburne v. Biddulph*, 6 Bro. P. C. 356; *Burke v. Smyth*, 3 Jo. & Lat. 193; *Moss v. Barton*, L. R. 1 Eq. 474.

(*s*) *Bryson v. Whitehead*, 1 Sim. & Stu. 74. But see *Baxter v. Conolly*, 1 Jac. & Walk. 576; *Coslake v. Till*, 1 Russ. 378.

(*t*) *Lane v. Newdigate*, 10 Ves. 192.

(*u*) *Withy v. Cottle*, 1 Sim. & Stu. 174. See also *Pritchard v. Ovey*, 1 Jac. & Walk. 396.

(*x*) *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Wright v. Bell*, 5 Price. 325.

(*y*) *Lumley v. Wagner*, 1 De G. M. & G. 604; *Morris v. Saxelby*, [1916] A. C. 688.

(*z*) *Withy v. Cottle*, 1 Sim. & Stu. 174; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Forrest v. Elwes*, 4 Ves. 497; *Flight v. Bolland*, 4 Russ. 298.

specifically performed because it is ordinarily obtainable in the market, and the damage suffered (if any) is capable of an exact compensation in damages; yet it is well known, that, as late as Lord Hardwicke's time, such contracts were so decreed in Chancery (a). And, in more recent times, it has been held, that an action will lie for specific performance of a contract for the purchase of government stock in favour of a holder of scrip receipts, purporting to give the title to the bearer thereof where the bill prayed for the delivery of the certificates, which gave the legal title to stock, upon the ground that a court of law could not give the property; but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party (b). If this, however, be a sufficient ground to entertain the jurisdiction, it seems universally applicable to all bills for a specific performance. In the case of a contract to convey shares in a railway, or other private corporation, specific performance is the appropriate remedy, because such shares are of uncertain value, and not always readily obtainable in the market (c).

§ 725. Some of the cases already stated are not purely cases respecting the sale, transfer, or enjoyment of personal chattels; but may properly be deemed to involve personal acts and proceedings. But it is difficult to separate the one class entirely from the other; and they naturally flow into each other. In regard, however, to contracts for personal acts and proceedings, there is some diversity of judgment in the authorities, as to the cases and circumstances in which a specific performance ought to be decreed in equity. Thus, for example, it has been a matter of some conflict of opinion, how far courts of equity ought to entertain a suit for the specific performance of a covenant to build or rebuild a house of a specified form and size on particular land. In the earlier cases, the jurisdiction was maintained (d); and Lord Hardwicke recognized it in its full extent, at the same time that he denied that a covenant to repair a house ought to be specifically performed (e). In more recent times the jurisdiction has not been disputed, but it has come to be recognized that its exercise is likely to inflict hardship upon the defendant, while the plaintiff would be amply compensated by an award of damages. The rule now established is that specific performance of a contract to build will not be granted unless the three following circumstances all occur: The first is that the building work is so clearly defined by the contract that the court can see what is the exact nature of the

(a) *Cud v. Rutter*, 1 P. Will. 570, 571; *Nutbrown v. Thornton*, 10 Ves. 161; *Mason v. Armitage*, 13 Ves. 25.

(b) *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

(c) *Duncuft v. Albrecht*, 12 Sim. 189; *Cheale v. Kenward*, 3 De G. & J. 27; *Poole v. Middleton*, 29 Beav. 646.

(d) *Holt v. Holt*, 2 Vern. 322; *Allen v. Harding*, 2 Eq. Abr. 17, pl. 6.

(e) *City of London v. Nash*, 3 Atk. 511, 515; *Pembroke v. Thorp*, 3 Swanst. 437, note; *Rook v. Worth*, 1 Ves. Sen. 461.

work to be done; secondly, that damages will not be an adequate compensation for a breach of the contract to execute the work; and thirdly, that the defendant has obtained possession of the land upon which the work is to be done on the faith of his contract to build (*f*).

§ 729. In regard to many other contracts for personal acts and proceedings, which are of a very different character, similar observations may apply. Thus, for instance, a covenant to renew a lease, will, as we have seen, be specifically decreed (*g*). So, a covenant to invest money in lands, and settle it in a particular manner (*h*). So, an agreement to settle the boundaries between two estates (*i*). And generally courts of equity will compel acts to be performed to clothe a party with a legal title, as by the execution of formal instruments, or the indorsing of negotiable instruments (*k*). Many other cases might easily be put to illustrate the same doctrine; as the case of a covenant not to build upon a contiguous estate, to the injury of an ancient messuage; of a covenant not to cut down timber-trees, which are peculiarly ornamental to the mansion of the covenantee; of a covenant not to erect any noisome or injurious manufacturing establishment on an estate adjacent to that of the covenantee; of a covenant not to carry on the same trade with the covenantee in the same street or town; and of a covenant that a house to be built adjacent to other houses should correspond with them in its elevation (*l*).

§ 730. Courts of equity will, upon analogous principles, interpose in many cases, to decree a specific performance of express, and even of implied contracts, where no actual injury has as yet been sustained, but it is only apprehended from the peculiar relation between the parties. This proceeding is commonly called a bill *Quia timet*, in analogy to some proceedings at law, where, in some cases, a writ may be maintained before any actual molestation, distress, or impleading of the party (*m*). Thus, as we have seen, a surety may file a bill to compel a debtor, on a bond in which he has joined, to pay the debt when due, whether the surety has been actually sued or not (*n*). And upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances (*o*). So, where property is covenanted to be secured for certain purposes, and in certain events,

(*f*) *Storer v. G. W. Ry.*, 2 Y. & C. Ch. 48; *Wilson v. Northampton and Banbury Ry.*, L. R. 8 Ch. 279; *Wolverhampton (Corp.) v. Emmons*, [1901] 1 K. B. 515.

(*g*) *Earl of Shelburne v. Biddulph*, 6 Bro. P. C. 356; *Burke v. Smyth*, 3 Jo. & Lat. 193.

(*h*) *Vernon v. Vernon*, 2 P. Wms. 594; *Jeston v. Key*, L. R. 6 Ch. 610; *Lee v. Lee*, 4 Ch. D. 175.

(*i*) *Penn v. Lord Baltimore*, 1 Ves. Sen. 444.

(*k*) *Lyde v. Munn*, 1 Myl. & K. 683; *Claringbould v. Curtis*, 21 L. J. Ch. 541.

(*l*) *Renals v. Cowlishaw*, 11 Ch. D. 866; *Spicer v. Martin*, 14 App. Cas. 12.

(*m*) Co. Litt. 100 a; *post*, § 825, 826, 850.

(*n*) *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Ascherman v. Tredegar Dry Dock Co.*, [1909] 2 Ch. 401.

(*o*) *Pember v. Mathers*, 1 Bro. C. C. 53.

and there is danger of its being alienated or squandered, courts of equity will interpose to secure the property for original purposes (p). And, generally, it may be stated, that in cases of contracts, express or implied, courts of equity will interpose to preserve the funds devoted to particular objects under such contracts, and decree, what in effect is a specific performance, security to be given, or the fund to be placed under the control of the court. This subject will present itself in some other aspects hereafter; and does not, therefore, require a fuller development in this place (q).

§ 736. In cases of covenants and other contracts, where a specific performance is sought, it is often material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. For if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from their nature they have ceased to have any just application by subsequent events, or it is against public policy to enforce them, courts of equity will not interfere. Thus, where two persons had agreed to work a coach from Bristol to London, one providing the horses for a part of the road, and the other for the remainder; and, in consequence of the horses of the latter being taken in execution, the former was obliged to furnish horses for the whole road, and claimed the whole profits; the court, on a bill by the party, who was so in default, for an account of the profits, and to restrain the other party from working the coaches with his own horses on the whole road, refused to interfere; because the default might again occur, and subject the defendant to an action (r). On the other hand, where a husband sought to prove against his deceased father-in-law's estate for the value of his life interest in certain property which his father-in-law had covenanted to settle; it was held to be no answer that the husband had not performed the stipulations in the same settlement in respect of property which he was to settle, he being entitled thereto for life and entitled in the event which had happened of the death of his wife without issue, to a general power of appointment over that fund, and consequently able to defeat the trusts of the settlement to that extent (s).

§ 737. So, where a conveyance in fee had been made of certain lands, and the feoffee covenanted not to use the land in a particular manner, with a view to the more ample enjoyment of the adjoining

(p) *Spiller v. Spiller*, 3 Swanst. 556; *London and County Bk. v. Lewis*, 21 Ch. D. 490.

(q) §§ 731 to 735 are taken up with a discussion as to whether a specific performance would be decreed of a covenant by a husband that his wife should levy a fine or execute any lawful conveyance to bar her right in his estate or her own estate. Owing to changes in the law of husband and wife, this discussion has only an historical interest, and is therefore omitted.

(r) *Smith v. Fromont*, 2 Swanst. 330.

(s) *Jeston v. Key*, L. R. 6 Ch. 610.

lands by the feoffor; and afterwards, by the voluntary acts of the feoffor and those claiming under him, the character and condition of the adjoining land had been so greatly altered, that the contemplated benefits were entirely gone; the court refused to interfere to compel a specific performance by injunction, and left the party to his remedy at law on the covenant (*t*). But in a subsequent case, where A. purchased a piece of ground in the centre of a square in London, and covenanted not to use it otherwise than as a pleasure-ground, an injunction was granted, restraining a subsequent purchaser from A. from using the ground in violation of the covenant (*u*).

§ 737*a*. With the growth of population, the law relating to restrictive covenants affecting the user of land has been developed, and the learned author's statement requires to be supplemented. It is inexpedient to discuss the cases at length in a book primarily intended for the use of students. The cases range themselves conveniently under one or other of two heads, but under which the particular instance is to be classed is a matter of great difficulty, depending as it does upon a consideration of all the facts. Land may be sold upon terms which make the restrictive stipulations a bargain between the immediate contracting parties, who are at liberty to vary the terms of the contract between them (*x*), and this they may do either in express terms or by waiver or acquiescence in a breach, and in the latter case the waiver or acquiescence will generally be limited in effect to the particular breach (*y*). And the benefit of covenants of this description may be made to run with the land at law and in equity (*z*), although the burden can only be made to run with the land sold in equity (*zz*). On the other hand, there may be what is known as a building scheme which confers a right upon purchasers of lots to sue purchasers of other lots for failure to observe restrictive stipulations relative to the use of land (*a*). And in this case the common vendor cannot dispense with the conditions or refuse to observe them (*b*).

§ 738. Before proceeding to the remaining head of specific performance, that of contracts respecting real estate, which will occupy our attention to a far greater extent, it may be proper to mention, that before Lord Somers's time, the practice used to be, on bills for a specific performance, to send the party to law; and if he recovered anything by way of damages, the Court of Chancery then entertained

(*t*) *Duke of Bedford v. Trustees of the British Museum*, 2 Myl. & K. 552.

(*u*) *Tulk v. Moxhay*, 13 Jur. 89, 2 Phil. 774.

(*x*) *Renals v. Cowlishaw*, 11 Ch. D. 866; *Osborne v. Bradley*, [1903] 2 Ch. 446.

(*y*) *Sayers v. Collyer*, 28 Ch. D. 103; *Knight v. Simmonds*, [1896] 2 Ch. 294.

(*z*) *Rogers v. Hosegood*, [1900] 2 Ch. 388.

(*zz*) *Haywood v. Brunswick Permanent Benefit Building Soc.*, 8 Q. B. D. 403.

(*a*) *Rowell v. Satchell*, [1903] 2 Ch. 212.

(*b*) *Spicer v. Martin*, 14 App. Cas. 12; *In re Birmingham and District Land Co. v. Allday*, [1893] 1 Ch. 342.

a suit; otherwise the bill was dismissed (*c*). And, hence the opinion has been expressed, that, unless damages were recoverable at law, no suit could be maintained in equity, for a specific performance. But the whole class of cases of specific performance of contracts respecting real estate, where the contract is by parol, and there has been a part performance, or where the terms of the contract have not been strictly complied with, and yet equity relieves the party, are proofs that the right to maintain a suit in equity, to compel a specific performance, does not, and cannot properly be said to depend upon the party's having a right to maintain a suit at law for damages. In cases of specific performance, courts of equity sometimes follow the law, and sometimes go far beyond the law; and their doctrines, if not wholly independent of the point, whether damages would be given at law, are not in general dependent upon it. Whoever should assume the existence of a right to damages in an action at law, as the true test of the jurisdiction in equity, would find himself involved in endless perplexity; for sometimes damages were formerly recoverable at law, where courts of equity would not decree a specific performance (*d*), and, on the other hand, damages might not be recoverable at law, and yet relief would be granted in equity (*e*). Under the present practice, where a party fails to substantiate his claim to specific performance, but is entitled to damages as the appropriate relief, it is the duty of the court to proceed at once to assess them (*f*).

§ 742. In truth, the exercise of this whole branch of equity jurisprudence, respecting the rescission and specific performance of contracts, is not a matter of right in either party; but it is a matter of discretion in the court (*g*); not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself as far as it may, by general rules and principles; but at the same time, which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties (*h*). On this account it is not possible to lay down any rules and principles, which are of absolute obligation and authority in all cases; and, therefore, it would be a waste of time to attempt to limit the principles, or the exceptions, which the complicated transactions of the parties, and the ever-changing habits of society, may, at different times, and under

(*c*) *Dodsley v. Kinnersley*, Ambler 406.

(*d*) *Shrewsbury and Birmingham Ry. v. L. & N. W. Ry.*, 17 Q. B. 652; in equity 6 H. L. C. 113.

(*e*) *Lester v. Foxcroft*, Colles P. C. 108; *Coles v. Pilkington*, L. R. 19 Eq. 174.

(*f*) *Tamplin v. James*, 15 Ch. D. 215; *Olley v. Fisher*, 34 Ch. D. 367.

(*g*) *Cloues v. Higginson*, 1 Ves. & B. 527; *Scott v. Alvarez*, [1895] 2 Ch. 603.

(*h*) *Hall v. Warren*, 9 Ves. 605; *Revell v. Hussey*, 2 Ball. & B. 280; *Haywood v. Cope*, 25 Beav. 140; *Smith v. Colbourne*, [1914] 2 Ch. 533.

different circumstances, require the court to recognize or consider. The most that can be done is, to bring under review some of the leading principles and exceptions which the past times have furnished, as guides to direct and aid our future inquiries.

§ 743. Let us now, in the next place, proceed to the consideration of the remaining and far the most numerous class of cases, in which courts of equity are called upon to decree a specific performance of contracts; that is to say, contracts respecting land. These are assigned to the Chancery Division of the High Court by section 34 of the Judicature Act, 1873 (36 & 37 Vict. c. 66). An action cannot be maintained for the specific performance of a contract where the subject-matter is land situate in a country not subject to the British crown (*i*). But if the land is situate in a country so subject (be it even a colony or dependency), then the action is maintainable. Accordingly, it was held by Lord Hardwicke, that the specific performance of a contract, respecting the boundaries of the colonies of Pennsylvania and Maryland, entered into by the proprietaries, might be decreed by the Court of Chancery in England (*k*). The like doctrine was held in the case of an agreement respecting the Isle of Man, where a specific performance was decreed by the Court of Chancery in England, although the isle was without the realm (*l*). In like manner, in a contract respecting lands in Ireland, a specific performance has been decreed (*m*).

§ 744. The incapacity to enforce the decree *in rem* constitutes no objection to the right to entertain such a suit (*n*). Where, indeed, the lands lie within the reach of the process of the court, courts of equity will not exclusively rely on the proceedings *in personam*; but will put the successful party in possession of the lands, if the other party remains obstinate, and refuses to comply with the decree (*o*).

§ 745. But to return to the class of cases where a specific performance is sought on contracts respecting land, situate in the country where the suit is brought. This class may be subdivided into two heads. (1) Where relief is sought upon parol contracts within the Statute of Frauds (29 Car. 2, ch. 3); and (2) where it is sought under written contracts, not falling within the scope of that statute.

§ 746. It has been already suggested, that courts of equity are in the habit of interposing to grant relief in cases of contracts respecting real property, to a far greater extent than in cases respecting

(*i*) *In re Hawthorn, Graham v. Massey*, 23 Ch. D. 743.

(*k*) *Penn v. Lord Baltimore*, 1 Ves. Sen. 444.

(*l*) *Earl of Athol v. Earl of Derby*, 1 Ch. Cas. 221.

(*m*) *Archer v. Preston*, cited 1 Vern. 77; s.c. 1 Eq. Abr. 133.

(*n*) *Earl of Arglasse v. Muschamp*, 1 Vern. 135.

(*o*) *Penn v. Lord Baltimore*, 1 Ves. Sen. 454; *Roberdeau v. Rous*, 1 Atk. 643; *Stribley v. Hawkie*, 3 Atk. 275.

personal property; not, indeed, upon the ground of any distinction founded upon the mere nature of the property, as real or as personal; but, at the same time, not wholly excluding the consideration of such a distinction. In regard to contracts respecting personal estate, it is (as has already been intimated) generally true that no particular or peculiar value is attached to any one thing over another of the same kind; and that a compensation in damages meets the full merits, as well as the full objects, of the contracts. If a man contracts for the purchase of a hundred bales of cotton, or bags of sugar or of coffee, of a particular description or quality, if the contract is not specifically performed, he may, generally, with a sum equal to the market-price, purchase other goods of the same kind of a like description and quality; and thus completely obtain his object, and indemnify himself against loss (*p*). But, in contracts respecting a specific message or parcel of land, the same considerations do not ordinarily apply. The locality, character, vicinage, soil, easements or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser; so that it cannot be replaced by other land of the same precise value but not having the same precise local conveniences or accommodations (*q*); and, therefore, a compensation in damages would not be adequate relief. It would not attain the object desired; and it would generally frustrate the plans of the purchaser. And hence it is, that the jurisdiction of courts of equity to decree specific performance, is, in cases of contracts respecting land, universally maintained; whereas, in cases respecting chattels, it is limited to special circumstances.

§ 747. Courts of equity, too, in cases of contracts respecting real property, have been in the habit of granting this relief, not only to a greater extent, but also under circumstances far more various and more indulgent than in cases of contracts respecting chattels. For they do not confine themselves to cases of a strict legal title to relief. Another principle, equally beneficial, is well known and established, that courts of equity will not permit the forms of law to be made the instruments of injustice; and they will, therefore, interpose against parties attempting to avail themselves of the rigid rules of law for unconscientious purposes. When, therefore, advantage is taken of a circumstance that does not admit of a strict performance in the contract, if the failure is not in a matter of substance, courts of equity will interfere (*r*). Thus, they are in the habit of relieving in contracts for real property, where the party, from his own inadvertence or neglect, has suffered the proper time to elapse for the punctilious performance of his contract, and from that and other circumstances,

(*p*) *Ante*, §§ 716, 717, 718 to 724.

(*q*) *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Peers v. Lambert*, 7 Beav. 546.

(*r*) *Halsey v. Grant*, 13 Ves. 73; *Hill v. Buckley*, 17 Ves. 394; *Wilson v. Williams*, 3 Jur. N. S. 810; *Rudd v. Lascelles*, [1900] 1 Ch. 815.

he could not maintain an action to recover damages at law until the equitable rule was made generally applicable by section 25, subsection 7 of the Judicature Act, 1873 (37 & 38 Vict. c. 66) (s). Even where nothing exists to prevent the parties suing at law, so many circumstances are necessary to enable him to recover at law, that the mere formal proofs alone render it very inconvenient and hazardous so to proceed, even if the legal remedy would (as in many cases it would not) be adequate to the demands of substantial justice.

§ 748. On these accounts (as has been well remarked), courts of equity have enforced contracts of this sort, where no action for damages could be maintained; for, at law, the party plaintiff must have strictly performed his part; and the inconvenience of insisting upon that in all cases is sufficient to require the interference of courts of equity. They dispense with that which would make a compliance with what the law requires oppressive; and, in various cases of such contracts, they are in the constant habit of relieving a party who has acted fairly, although negligently (t).

§ 749. On the other hand, as the interference of courts of equity is discretionary, they will not enforce a specific performance of such contracts at the instance of the vendor, where his title is involved in difficulties which cannot be removed readily, although, perhaps, at law, an action might be maintainable against the defendant for damages for his not completing his purchase (u).

§ 750. Indeed, the proposition may be more generally stated, that courts of equity will not interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree (x). There is no pretence to say, that it is the doctrine of courts of equity to carry into specific execution every contract in all cases, where that is found to be the legal intention and effect of the contract between the parties. If, in any case, the parties have so dealt with each other, in relation to the subject-matter of a contract, that the object of one party is defeated, while the other party is at liberty to do as he pleases, in relation to that very subject; or if, in fact, the character and condition of the property, to which the contract is attached, have been so altered, that the terms and restrictions of it are no longer applicable to the existing state of things; in such cases courts of equity will not grant any relief, but will leave the parties to their remedy at law (y).

(s) *Seton v. Slade*, 7 Ves. 265; *Stickney v. Keeble*, [1915] A. C. 386.

(t) Lord Redesdale, in *Lennon v. Napper*, 2 Sch. & Lefr. 684.

(u) *Lechmere v. Brazier*, 2 J. & W. 287; *Fraser v. Wood*, 8 Beav. 339; *Nokes v. Lord Kilmorey*, 1 De G. & Sm. 444.

(x) *Webster v. Cecil*, 30 Beav. 62; *Higgins v. Samels*, 2 J. & H. 460; *Earl of Durham v. Legard*, 34 Beav. 611; *Rudd v. Lascelles*, [1900] 1 Ch. 815.

(y) *Duke of Bedford v. Trustees of the British Museum*, 2 Myl. & K. 552.

§ 751. Where, indeed, a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it (z). And generally, it may be stated, that courts of equity will decree a specific performance, where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed (a), but not otherwise. The form of the instrument, by which the contract appears, is wholly unimportant. Thus, if the contract appears only in the condition of a bond secured by a penalty, the court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty (b). On the other hand, if courts of equity refuse to interfere, they inflict no injury upon the plaintiff; for no decision is made, which affects his right to proceed at law for any redress by way of damages to which he may be entitled. The whole effect of the dismissal of his suit is, that he is barred of any equitable relief.

§ 751a. Courts of equity will also, in allowing or denying a specific performance, look not only to the nature of the transaction, but also to the character of the parties who have entered into the contract. Thus, if the purchase be made by trustees for the benefit of a *cestui que trust*, and there be a substantial misdescription of the premises, courts of equity will not enforce against them a specific performance with compensation, as being prejudicial to the *cestui que trust* and incapable of being ascertained (c).

§ 752. With these explanations in view, let us now proceed to examine, in the first place, in what cases a specific performance will be decreed of contracts respecting lands, where they are within the provisions of the Statute of Frauds (29 Car. II. c. 3). That statute declares that "All interests in lands, tenements, and hereditaments, except leases for three years, not put in writing and signed by the parties or their agents authorized by writing, shall not have, nor be deemed in law or equity to have, any greater force or effect than leases or estates at will." It further enacts that, "No action shall be brought, whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, or upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party or his lawful

(z) *Hall v. Warren*, 9 Ves. 608; *Eastern Counties Ry. v. Hawkes*, 5 H. L. C. 331.

(a) *Denton v. Stewart*, 1 Cox 258; *Greenaway v. Adams*, 12 Ves. 395, 400.

(b) *Logan v. Weinhold*, 1 Cl. & F. 611; *French v. Macale*, 2 Dru. & War. 269.

(c) *Wedgwood v. Adams*, 6 Beav. 600.

agent." By the same statute, declarations of trust of land (*d*), created by the parties, cannot be enforced unless manifested and proved by writing; but trusts resulting by implication of law are to remain as they stood before the passing of the Act.

§ 753. The objects of this statute are such, as the very title indicates, to prevent the fraudulent setting up of pretended agreements, and then supporting them by perjury. But, besides these direct objects, there is a manifest policy in requiring all contracts of an important nature to be reduced to writing, since otherwise, from the imperfection of memory, and the honest mistakes of witnesses, it must often happen, either that the specific contract is incapable of exact proof, or that it is unintentionally varied from its precise original terms. So sensible were courts of equity of these mischiefs, that they constantly refused, before the statute, to decree a specific performance of parol contracts, unless confessed by the party in his answer, or unless they were in part performed (*e*).

§ 754. It is obvious that courts of equity are bound, as much as courts of law, by the provisions of this statute; and, therefore, they

(*d*) *McFadden v. Jenkyns*, 1 Ph. 153; *Cochrane v. Moore*, 25 Q. B. D. 57.

(*e*) Lord St. Leonards, in his learned treatise on Vendors and Purchasers, ch. 4, § 2, pp. 107, 108 (7th edit.), has reviewed the cases and stated the result. "There are four cases in Tothill, which arose previously to the Statute of Frauds, and appear to be applicable to the point under consideration; for equity, even before the Statute of Frauds, would not execute a mere parol agreement, not in part performed. In the first case, *Williams v. Neville*, Toth. 135, which was heard in the 38th of Eliz., relief was denied, 'because it was but a preparation for an action upon the case.' In the two next cases (*Ferne v. Bullock*, Toth. 206, 208; *Clark v. Hackwell*, id.), which came on in the 9th of Jac. 1, parol agreements were enforced, apparently on account of the payment of a very trifling part of the purchase-money; but the particular circumstances of these cases do not appear. The last case reported in Tothill (*Miller v. Blandist*, Toth. 85) was decided in the 30th of Jac. 1, and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there had not been any execution, but only 55s. paid in hand, and the bill was dismissed. This point received a similar determination in the next case on the subject before the statute, which is reported in 1 Ch., and was determined in the 15th of Car. 2. *Simmons v. Cornelius*, 1 Ch. 128. So the same doctrine was adhered to in a case which occurred three years afterwards, and is reported in Freeman, *Anon.*, 2 Freem. 128; for, although a parol agreement for a house, with 20s. paid, was decreed without further execution proved, yet it appears by the judgment, that the relief would not have been granted if the defendant, the vendor, had demurred to the bill, which he had neglected to do, but had proceeded to proof. The last case I have met with previously to the statute, was decided in the 21st of Car. 2, *Voll v. Smith*, 3 Ch. 16, and there a parol agreement, upon which only 20s. were paid, was carried into specific execution. This case probably turned, like the one immediately preceding it, on the neglect of the defendants to demur to the bill. It must be admitted that the foregoing decisions are not easily reconcilable; yet, the result of them clearly is, that payment of a trifling part of the purchase-money was not a part performance of a parol agreement. Whether payment of a considerable sum would have availed a purchaser does not appear. In Toth. 67, a case is thus stated: '*Moyl v. Horne*, by reason £200 was deposited towards payment, decreed.' This case may, perhaps, be deemed an authority, that, prior to the statute, the payment of a substantial part of the purchase-money would have enabled equity to specifically perform a parol agreement; but it certainly is too vague to be relied on.' *Ibid.*, p. 120.

are not at liberty to disregard them (f). That they do, however, interfere in some cases within the reach of the statute, is equally certain. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it, and independent of it (g).

§ 755. In the first place, then, courts of equity will enforce a specific performance of a contract within the statute, not in writing, where it is fully set forth in the statement of claim and admitted in the defence of the defendant (h). The statute is obviously designed to guard against fraud and perjury; and where there is no conflict of evidence, the case then is taken entirely out of the mischief intended to be guarded against by the statute (i). Another reason was suggested by the learned author; and that was that the agreement, although originally by parol, became thereby evidenced by writing under the signature of the party which is a complete compliance with the terms of the statute. This reason is clearly inadmissible, for although the statutory requirements are satisfied by a writing coming into existence after the contract is entered into (k), the writing must have been in existence before action brought (l).

§ 756. But where the defence admits the parol agreement, and insists upon the Statute of Frauds as a defence, the question arises whether courts of equity will allow the statute, under such circumstances, as a bar; or whether they will, notwithstanding the statute, decree a specific performance upon the ground of the confession. Upon this question, there has been no small conflict of judicial opinion. Lord Macclesfield expressly decreed a specific performance in such a case (m).

§ 757. But this opinion must now be deemed to be entirely overruled, and the doctrine firmly established, that even where the defence admits the parol agreement, if it insists, as it must now do (n), by way of defence, upon the protection of the statute, the defence must prevail as a competent bar (o). This doctrine seems conformable to the true intent and objects of the statute, which does not affect the

(f) *Emmet v. Dewhurst*, 3 Mac. & G. 587; *Caton v. Caton*, L. R. 1 Ch. 137; 2 H. L. 127; *May v. Platt*, [1900] 1 Ch. 616.

(g) *Mallet v. Halpenny*, cited Prec. Ch. at p. 404; *Middleton v. Middleton*, 1 J. & W. 94; *Wood v. Midgley*, 5 De G. M. & G. 41.

(h) *Att.-Gen. v. Sitwell*, 1 Y. & C. Ex. at p. 583; *Ex parte National Provincial Bk. of England; in re Boulter*, 4 Ch. D. 241.

(i) *Bacon, V.-C., Ex parte National Provincial Bk. of England, in re Boulter*, 4 Ch. D. 241.

(k) *In re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

(l) *Lucas v. Dixon*, 22 Q. B. D. 357.

(m) *Child v. Godolphin*, 1 Dick. 39; s.c. cited 2 Bro. C. C. 566; *Child v. Comber*, 3 Swanst. 423, note.

(n) R. S. C. 1883, Order XIX., rule 15; *Catling v. King*, 5 Ch. D. 660.

(o) *Blagden v. Bradbear*, 12 Ves. 466.

validity of the contract, but merely the method of proof (*p*), and by insisting on the statute, the defendant merely exercises his right to put the plaintiff to a strict proof of his case.

§ 759. In the next place, courts of equity will enforce a specific performance of a contract within the statute, provided it affects land (*q*), where the parol agreement has been partly carried into execution. The distinct ground, upon which courts of equity interfere in cases of this sort, is, as before observed, that the statute does not affect the validity of the contract. It would, therefore, have entitled a defendant to an action for trespass *quare clausum fregit*, to prove a verbal agreement for a sale of land under a plea of leave or licence. Where the act of the party defendant would have been a trespass but for the verbal agreement, then the agreement may be sued upon in equity as a substantive cause of action (*r*).

§ 760. But the more difficult question is to ascertain what, in the sense of courts of equity, is to be deemed a part performance, so as to extract the case from the reach of the statute. It seems formerly to have been thought that a deposit, or security, or payment of the purchase-money, or a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute. But that doctrine was open to much controversy, and is now finally overthrown (*s*). Indeed, the distinction taken in some of the cases, between the payment of a small part and the payment of a considerable part of the purchase-money seems quite too refined and subtle; for, independently of the difficulty of saying what shall be deemed a small, and what a considerable, part of the purchase-money, each must, upon principle, stand upon the same reason; namely, that it is a part performance in both cases, or not in either. One ground, why part payment is not now deemed a part performance, sufficient to take a case out of the statute, is, that the money can be recovered back again at law (*t*), and, therefore, the case admits of full and direct compensation. This ground is not, however, quite satisfactory; for the party may become insolvent before the judgment at law can be executed. But the purchaser is also entitled to an equitable lien upon the land for the money paid by him (*u*). Another ground has been stated. It is, that the statute has said, in another clause (that

(*p*) See *Buckmaster v. Harrop*, 7 Ves. 346; *Whitbread v. Brookhurst*, 1 Bro. C. C. 417; s.c. 2 Ves. & B. 153, note; *Morphett v. Jones*, 1 Swanst. 181; *Clinan v. Cooke*, 1 Sch. & Lefr. 41; Mr. Raithby's note to *Hollis v. Edwards*, 1 Vern. 159; *Leroux v. Brown*, 12 C. B. 801.

(*q*) *Britain v. Rossiter*, 11 Q. B. D. 123; *Maddison v. Alderson*, 8 App. Cas. 467.

(*r*) *Wilson v. West Hartlepool Ry.*, 2 De G. J. & S. 475; *Mills v. Haywood*, 6 Ch. D. 196; *Dickinson v. Barrow*, [1904] 2 Ch. 339.

(*s*) *Clinan v. Cooke*, 1 Sch. & Lefr. 22; *Caddick v. Skidmore*, 2 De G. & J. 52.

(*t*) *Wilde v. Fort*, 4 Taunt. 334.

(*u*) *Rose v. Watson*, 10 H. L. C. 672; *Whitbread & Co. v. Watt*, [1902] 1 Ch. 835.

which respects contracts for goods), that part payment, by way of earnest, shall operate as a part performance. And hence, the courts have considered this clause as excluding agreements for lands, because it is to be inferred, that, when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands (x).

§ 761. But a more general ground, and one which has met with some favour, is, that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed (y). This is hardly accurate, although the converse holds good, namely, that where it would be a fraud upon the party in the nature of a surprise, not to give effect to the verbal agreement, the statute will be displaced. Thus, for instance, if upon a parol agreement a man is admitted into possession, he could be made a trespasser, unless allowed to set up a parol agreement for the purpose of defending himself against a charge as a trespasser, and against an action to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose, there seems no reason why it should not be admissible throughout (z). A case still more cogent might be put, where a vendee, upon a parol agreement for a sale of land, should proceed to build a house on the land, in the confidence of a due completion of the contract. In such a case, there would be a manifest fraud upon the party, in permitting the vendor to escape from a due and strict fulfilment of such agreement (a). Such a case is certainly distinguishable from that of part payment of the purchase-money, for the latter may be repaid, and the parties are then just where they were before, especially if the money is repaid with interest. A man who has parted with his money is not in the situation of a man against whom an action may be brought, and who may otherwise suffer an irreparable injury (b).

§ 762. In order to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For, if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement (c). On this account, acts,

(x) *Clinan v. Cooke*, 1 Sch. & Lefr. 22.

(y) *Clinan v. Cooke*, 1 Sch. & Lefr. 22.

(z) *Pain v. Coombs*, 1 De G. & J. 34; *Wilson v. West Hartlepool Ry.*, 4 De G. J. & S. 475; *Mills v. Hayward*, 6 Ch. D. 196. See *Dickinson v. Barrow*, [1904] 2 Ch. 339.

(a) *Lester v. Foxcroft*, Colles P. C. 108; *Savage v. Foster*, 9 Mod. 35; *Coles v. Pilkington*, L. R. 19 Eq. 174.

(b) *Wilde v. Fort*, 4 Taunt. 334; *Sutherland v. Briggs*, 1 Hare 26.

(c) *Frame v. Dawson*, 14 Ves. 386; *Ex parte Hooper*, 19 Ves. 479; *Morphett v.*

merely introductory or ancillary to an agreement, are not considered as a part performance thereof, although they should be attended with expense. Therefore, delivering an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute (*d*). They are all preliminary proceedings, and are, besides, of an equivocal character, and capable of a double interpretation; whereas acts, to be deemed a part performance, should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution.

§ 763. In like manner, the mere possession of the land contracted for will not be deemed a part performance, if it be obtained wrongfully by the vendee, or if it be wholly independent of the contract. Thus, if the vendee enter into possession, not under the contract, but in violation of it, as a trespasser, the case is not taken out of the statute. So, if the vendee be a tenant in possession under the vendor; for his possession is properly referable to his tenancy, and not to the contract (*e*). But if the possession be delivered and obtained solely under the contract; or if, in case of tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, referable solely and exclusively to the contract; there, the possession may take the case out of the statute. Especially will it be held to do so, where the party let into possession has expended money in building or repairs, or other improvements; for under such circumstances, if the parol contract were to be deemed a nullity, he would be liable to be treated as a trespasser; and the expenditure would not only operate to his prejudice, but be the direct result of a fraud practised upon him (*f*).

§ 763a. It seems to be now settled that possession, taken previously to, but continued after, a parol agreement, may be a sufficient act of part performance to exclude a defence founded on the Statute of Frauds, if the entry being tortious originally, the continuance in possession has been acquiesced in by the defendant, or if the possession can otherwise be referred to the contract alleged (*g*).

Jones, 1 Swanst. 181; *Reynolds v. Waring*, Younge, 346; *Maddison v. Alderson*, 8 App. Cas. 467.

(*d*) *Pembroke v. Thorpe*, 3 Swanst. 437 n.; *Clarke v. Wright*, 1 Atk. 12; *Whaley v. Bagenal*, 1 Bro. P. C. 345; *Frame v. Dawson*, 14 Ves. 386.

(*e*) *Cole v. White*, cited 1 Bro. C. C. 409; *Frame v. Dawson*, 14 Ves. 386; *Clinan v. Cooke*, 1 Sch. & L. 22; *Lindsay v. Lynch*, 2 Sch. & Lefr. 1.

(*f*) *Wills v. Stradling*, 3 Ves. 378; *Gregory v. Mighell*, 18 Ves. 328; *Morphett v. Jones*, 1 Swanst. 172; *Fabian v. Nunn*, L. R. 1 Ch. 35.

(*g*) *Gregory v. Mighell*, 18 Ves. 328; *Hodson v. Heuland*, [1896] 2 Ch. 428.

§ 763*b*. In recent times the opinion has been expressed judicially that the following propositions result from the authorities:—

(1) “The doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the Statute of Frauds, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases.

(2) “Probably it would be more accurate to say it applies to all cases in which a court of equity would entertain a suit for specific performance, if the alleged contract had been in writing.

(3) “The most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement.

(4) “The reason for the rule is that, where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute.

(5) “But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement, which, if in writing, would be such as the court would direct to be specifically performed.

(6) “The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired” (*h*).

§ 764. But in order to take a case out of the statute, upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract, but that the contract should also be established by competent proofs to be clear, definite, and unequivocal in all its terms. If the terms are uncertain, or ambiguous, or not made out by satisfactory proofs, a specific performance will not (as, indeed, upon principle it should not) be decreed. The reason would seem obvious enough, for a court of equity ought not to act upon conjecture; and one of the most important objects of the statute was, to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts. Yet it is certain that, in former times, very able judges felt themselves at liberty to depart from such a reasonable course of adjudication, and granted relief, notwithstanding the uncertainty of the terms of the contract. In other words, the court framed a contract for the parties, *ex æquo et bono*, where it found none (*i*). Such a latitude of jurisdiction seems unwarrantable upon any sound principle, and, accordingly, it has been expressly renounced in more recent times (*k*). It may, perhaps, be true that, in such cases of part performance, the court has not been

(*h*) *McManus v. Cooke*, 35 Ch. D. 681, 697.

(*i*) *Anon.*, 5 Vin. Abr. 523, pl. 40; *ibid.* 522, pl. 38; *Anon.*, cited 6 Ves. 470; *Allan v. Bower*, 3 Bro. C. C. 149.

(*k*) *Milnes v. Gery*, 14 Ves. 400; *Reynolds v. Waring*, Younge, 346.

deterred from making an inquiry, before a master, into the terms of the contract, by the mere fact that all the terms are not sufficiently before the court to enable it to make a final decree (*l*). But if such an inquiry should end in leaving the contract uncertain, so that the court cannot say what its precise import and limitations are, then the court will withhold a final decree for a specific performance (*m*).

§ 765. It must be admitted that the exceptions thus allowed do greatly trench upon the policy and objects of the Statute of Frauds; and, perhaps, there might have been as much wisdom originally in leaving the statute to its full operation, without any attempt to create exceptions, even in cases where the statute would enable the party to protect himself from a performance of his contract through a meditated fraud. For, even admitting that such cases might occur, they would become more and more rare as the statute became better understood; and a partial evil ought not to be permitted to control a general convenience. And, indeed, it is far from being certain that these very exceptions do not assist parties in fraudulent contrivances, and increase the temptations to perjury, quite as often as they do assist them in the promotion of good faith and the furtherance of justice. These exceptions have also led to great embarrassments in the actual administration of equity; and although in some cases one may clearly see that no great mischiefs can occur from enforcing them, yet, in others, difficulties may be stated in their practical application which compel us to pause, and to question their original propriety.

§ 766. Considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the Statute of Frauds farther than they were compelled to do by former decisions (*n*). Lord Redesdale has strongly said, "The statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing; whereas it is manifest that the decisions on the subject have opened a new door to fraud, and that, under pretence of part execution, if possession is had in any way whatsoever, means are frequently found to put a court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. And, I remember, it was mentioned in one case, in argument, as a

(*l*) *Allan v. Bower*, 3 Bro. C. C. 149, and Mr. Belt's notes, p. 151, notes (2), (3).

(*m*) *Lindsay v. Lynch*, 2 Sch. & Lefr. 7, 8.

(*n*) Lord Alvanley, M.R., *Forster v. Hale*, 3 Ves. at p. 713; Alexander, C.B., *Reynolds v. Waring*, Younge, at p. 350.

common expression at the bar, that it had become a practice to *improve gentlemen out of their estates*. It is, therefore, absolutely necessary for courts of equity to make a stand, and not carry the decisions farther" (o).

§ 767. We have already had occasion to see that parol agreements, even with part performance, will not be decreed to be specifically executed unless the whole terms of the contract are clear and definitely ascertained (p). The same rule applies to cases of written contracts. If they are not certain in themselves, so as to enable the court to arrive at the clear result of what all the terms are, they will not be specifically enforced (q). In the first place, it would be inequitable to carry a contract into effect where the court is left to ascertain the intentions of the parties by mere conjecture or guess; for it might be guilty of the error of decreeing precisely what the parties or one of them never did intend or contemplate (r). In the next place, if any terms are to be supplied, it must be by parol evidence; and the admission of such evidence would let in all the mischief intended to be guarded against by the statute. Indeed, it would be inconsistent with the general principles of evidence (although there are exceptions (s)) which are administered in courts of equity as well as in courts of law; for the general rule in both courts is, that parol evidence is not admissible to vary or explain a written contract (t); the natural inference being that the parties regard a formal instrument as embodying the whole terms of their ultimate agreement, an inference which may be displaced by appropriate evidence (u). Evidence is admissible and indeed necessary to identify the subject-matter (x).

§ 768. Another exception to the statute, turning upon similar considerations, is, where the agreement is intended by the parties to be reduced to writing, according to the statute; but it is prevented from being done by the fraud of one of the parties. In such a case, courts of equity have said that the agreement shall be specifically executed, for otherwise, the statute, designed to suppress fraud, would

(o) *Lindsay v. Lynch*, 2 Sch. & Lefr. 4, 5, 7.

(p) *Ante*, §§ 751, 764o.

(q) *Harnett v. Yeilding*, 2 Sch. & Lefr. 549; *Taylor v. Portington*, 7 De G. M. & G. 328; *Douglas v. Baynes*, [1906] A. C. 477.

(r) *Lindsay v. Lynch*, 2 Sch. & Lefr. 7, 8; *Harnett v. Yeilding*, 2 Sch. & Lefr. 555; *Holloway v. Headington*, 8 Sim. 324.

(s) Some of these exceptions have been already considered under the heads of *Accident*, *Mistake*, and *Fraud*; but the full examination of the subject belongs to a treatise on Evidence.

(t) *Marq. Townshend v. Stangroom*, 6 Ves. 328; *Rich v. Jackson*, in note, 6 Ves. 334, note (c); *Woollam v. Hearn*, 7 Ves. 211.

(u) *Harris v. Rickett*, 4 H. & N. 1; *Loxley v. Heath*, 1 De G. F. & J. 489; *Legott v. Barrett*, 15 Ch. D. 306; *Page v. Midland Ry.*, [1894] 1 Ch. 11.

(x) *Ogilvie v. Foljambe*, 3 Mer. 53; *Macdonald v. Longbottom*, 1 Ell. & E. 977; *Shardlow v. Cotterill*, 20 Ch. D. 90.

be the greatest protection to it (y). Thus, if one agreement in writing should be proposed and drawn, and another should be fraudulently and secretly brought in and executed in lieu of the former, in this and the like cases equity would relieve. So, if instructions are given by an intended husband to prepare a marriage settlement, and he promises to have the settlement reduced to writing, and then fraudulently and secretly prevents it from being done, and the marriage takes effect, in consequence of false assurances and contrivances, a specific performance will be decreed (z). But, if there has been no fraud, and no agreement to reduce the matter to writing; but the one party has placed reliance solely upon the honour, word, or promise of the other, no relief will be granted (a); for in such a case the party chooses to rest upon a parol agreement, and must take the consequences (b). And the subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own grounds (c). So, if a man should treat for a loan of money on mortgage, and the conveyance is to be by an absolute deed of the mortgagor, and a defeasance by the mortgagee; and, after the absolute deed is executed, the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance (d). So, where a father had purchased lands in fee, and on his death-bed told his eldest son that the lands were purchased with his second son's money, and that he intended to give them to him, and the eldest son promised that he should enjoy them accordingly, and the father died, and the eldest son refused to comply with his promise; it was held that the promise should be specifically performed, upon the ground of fraud, notwithstanding the objection that there ought to have been a declaration of the use or trust, under the statute (e). Other cases of a like character have occurred under the head of fraud, and similar considerations may apply in cases of accident and mistake, clearly and incontrovertibly made out (f).

§ 769. And here it is important to take notice of a distinction between the case of a plaintiff seeking a specific performance in

(y) *Montacute v. Maxwell*, 1 P. Will. 618; s.c. 1 Eq. Abr. 19, Prec. Ch. 526.

(z) *Ibid.* See *ante*, §§ 331, 374; *Taylor v. Beech*, 1 Ves. 297, 298; *Redding v. Wilkes*, 3 Bro. C. C. 400; *Dundas v. Dutens*, 1 Ves. Jun. 196, 199; s.c. 2 Cox 234.

(a) *Wood v. Midgley*, 5 De G. M. & G. 41.

(b) It has sometimes been attempted to except from the statute cases where the parties have expressly agreed that their contract should be reduced to writing. But this doctrine, except in cases of fraud, has been expressly denied. *Hollis v. Whiteing*, 1 Vern. 151, 159; *Whitchurch v. Bevis*, 2 Bro. C. C. 565.

(c) *Caton v. Caton*, L. R. 1 Ch. 65; *Johnstone v. Mappin*, 60 L. J. Ch. 241.

(d) *Maxwell v. Montacute*, Prec. Ch. 526; *Walker v. Walker*, 2 Atk. 99; *Young v. Peachey*, 2 Atk. 258; *Joyes v. Satham*, 3 Atk. 389.

(e) *Sellack v. Harris*, 5 Vin. Abr. 521, pl. 31; *Podmore v. Gunning*, 7 Sim. 644; *post*, § 1265.

(f) See *ante*, under the heads of *Accident*, *Mistake*, and *Fraud*, §§ 99, 206, 256, 386.

equity, and the case of a defendant, resisting such a performance. We have already seen, that the specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court (*g*). Hence, it requires a much less strength of case on the part of the defendant to resist an action to perform a contract, than it does on the part of the plaintiff to maintain an action to enforce a specific performance; for the refusal to enforce a specific performance of a contract, does not deprive the party of his remedy at law (*h*). An agreement to be entitled to be carried into specific performance, ought (as we have seen) to be certain, fair and just in all its parts (*i*). Courts of equity will not decree a specific performance in cases of fraud or mistake (*k*); or of hard and unconscionable bargains; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy (*l*); or where it would involve a breach of trust; or where a performance has become impossible; and, generally, not in any cases where such a decree would be inequitable under all the circumstances (*m*).

§ 770. But courts of equity do not stop here; for they will let in the defendant to defend himself, by evidence to resist a judgment, where the plaintiff would not always be permitted to establish his case by the like evidence. Thus, for instance, courts of equity will allow the defendant to show, that, by fraud, accident, or mistake, the thing bought is different from what he intended; or that material terms have been omitted in the written agreement; or that there has been a variation of it by parol (*n*); or that there has been a parol discharge of a written contract (*o*). The ground of this doctrine is that which has been already alluded to, that courts of equity ought not to be active in enforcing claims, which are not, under the actual circumstances, just, as between the parties. The statute has said, that no person shall be charged with the execution of an agreement, who has not personally, or by his agent, signed a written agreement. But the statute does not say, that, if a written agreement is signed, the same exceptions shall not hold to it, as did before the statute. Now, before

(*g*) *Ante*, § 742.

(*h*) *Vigers v. Pike*, 8 Cl. & F. 562, and Lord Cottenham's remarks, p. 645; *Tamplin v. James*, 15 Ch. D. 215.

(*i*) *Buxton v. Lister*, 3 Atk. 385; *Harnett v. Yeilding*, 2 Sch. & Lefr. 554; *Ellard v. Landoff*, 1 Ball & Beat. 250; *ante*, § § 693, 750, 751, 767. See also *Drysdale v. Mace*, 5 De G. M. & G. 103.

(*k*) *Davis v. Shepherd*, L. R. 1 Ch. 410. Where mistake is not mutual, but parties can be restored to *statu quo*, equity will rectify with option on part of defendant to rescind. *Harris v. Pepperell*, L. R. 5 Eq. 1. See *Bloomer v. Spittle*, L. R. 13 Eq. 427.

(*l*) See *Flanagan v. Great Western Ry.*, L. R. 7 Eq. 116.

(*m*) *Ante*, § 650; *Kimberley v. Jennings*, 6 Sim. 340; *Harnett v. Yeilding*, 2 Sch. & Lefr. 554, 555; *Greenaway v. Adams*, 13 Ves. 399, 400; *Denton v. Stuart*, 1 Cox 258.

(*n*) *Woollan v. Hearn*, 7 Ves. 211.

(*o*) *Morris v. Baron & Co.*, [1918] A. C. 1.

the statute, if a bill had been brought for a specific performance, and it had appeared that the agreement had been prepared contrary to the intentions of the defendant, he might have resisted the performance of it. The statute has made no alteration in this respect in the situation of the defendant. It does not say a written agreement shall bind; but only that an unwritten agreement shall not be enforceable (*p*). There are, however, certain exceptions to this doctrine, which have been allowed to prevail; as, for example, where the defendant sets up, in his defence to a bill for the specific performance of a written contract, that there has been a parol variation or addition thereto by the parties; if the plaintiff assents thereto, he may amend his claim, and at his election have a specific performance of the written contract, with such variations or additions so set up; for, under such circumstances, there is a written admission of each party to the parol variation or addition, and there can be no danger of injury to the parties, or evasion of the rules of evidence, or of the Statute of Frauds (*q*). So, the court may decree a specific performance in favour of the plaintiff, notwithstanding he does not make out the case stated by his bill, if he offers to comply with the contract as the defendant states it (*r*).

§ 771. In general, it may be stated that, to entitle a party to a specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance on his own part. If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his action will be dismissed; for courts of equity do not, any more than courts of law, administer relief to the gross negligence of suitors (*s*). But this doctrine is to be taken (as we shall presently see) with some qualifications. For, although courts of equity will not encourage laches, yet if there has not been a strict legal compliance with the terms of the contract and the non-compliance does not go to the essence of the contract, relief will be granted (*t*).

§ 772. It has been laid down, that, if a man has performed a valuable part of an agreement, and is in no default for not performing the residue, there it is but reasonable that he should have a specific execution of the other part of his contract, or at least should recover back what he has paid, so that he may not be a loser. For, since he entered upon the performance in contemplation of the equivalent from the other party, there is no reason why an accidental loss should fall upon him any more than upon the other (*u*). A distinction has

(*p*) Lord Selborne, L.C., *Jervis v. Berridge*, L. R. 8 Ch. at p. 360; *Snelling v. Thomas*, L. R. 17 Eq. 303.

(*q*) *London and Birmingham Ry. v. Winter*, Cr. & Ph. 57.

(*r*) *Marquess Townshend v. Stangrom*, 6 Ves 328; *Smith v. Wheatcroft*, 9 Ch. D. 223.

(*s*) *Howe v. Smith*, 27 Ch. D. 89; *Cornwall v. Henson*, [1900] 2 Ch. 298.

(*t*) *Post*, § § 776, 777.

(*u*) Gilb. Lex Prætor. 240, 241; *post*, § § 775, 976.

been put upon this subject by Lord Chief Baron Gilbert, which is entitled to consideration because it apparently reconciles authorities which might otherwise seem discordant. It is the distinction between cases in which the plaintiff is *in statu quo* as to all that part of his agreement which he has performed, and those cases in which he is not *in statu quo*. In the former cases, equity will not enforce the agreement, if the plaintiff cannot completely perform the whole of his part of it; in the latter cases, equity will enforce it, notwithstanding he is incapable of performing the remainder by a subsequent accident (x).

§ 773. Thus, upon a marriage settlement, A. contracted to settle a manor on his wife and the heirs of their bodies, and to clear it of incumbrances, and to settle a separate maintenance on her, and likewise to sell some pensions, in order to make a further provision for her and the issue of the marriage; and his father-in-law agreed to settle £3,000 per annum on A. for life, remainder to the wife for life, and so to the issue of the marriage. A. cleared the manor of incumbrances, and settled it accordingly, and settled also the separate maintenance; but he did not sell the pensions, nor settle the further provisions. The wife died without issue; and A. brought his bill to have the £3,000 settled on him during his life. The court refused to decree it; because A. was *in statu quo*, as to all that part of the agreement which he had performed, and not having performed the whole, and the other part being now impossible, and no compensation being possible to be adjusted for it, he had no title in equity to a specific performance, since such performance would not be mutual. But the issue of A., if any, might have been relieved, because they would have been in no default. This case illustrates the first proposition (y).

§ 774. But (which is the second case) if a man has performed so much of the agreement, as that he is not *in statu quo*, and is in no default for not performing the residue, there he shall have a specific execution of the agreement from the other party. As, if a man has contracted for a portion to be received with the wife, and has agreed to settle lands of a certain value upon the wife, and her issue free of incumbrances; and he sells part of his lands to disincumber the other lands, and is proceeding to disincumber and settle the rest. In such a case, if the wife should die without issue before the settlement is actually made, yet he shall have the portion, because he cannot be placed *in statu quo*, having sold a part of his lands; and there was

(x) Gilb. Lex Prætor, 240.

(y) Gilb. Lex Prætor, 240, 241; *Feversham v. Watson*, Rep. temp. Finch 445; s.c. 2 Freem. 35. But see Hovenden's note to 2 Freem. 35 (4). The case seems to have been put in the reports upon the ground that the covenants of the plaintiff were by way of condition precedent, which could not be dispensed with in equity. Rep. temp. Finch 447; 2 Freem. 35.

no default in him, since he was going on to perform his contract; and, therefore, the accident of the wife's death shall not prejudice him (z).

§ 775. Where the terms of an agreement have not been strictly complied with, or are incapable of being strictly complied with; still, if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed; and if compensation may be made for an injury occasioned by non-compliance with the strict terms; in all such cases courts of equity will interfere, and decree a specific performance. For the doctrine of courts of equity is, not forfeiture, but compensation (a); and nothing but such a decree will, in such cases, do entire justice between the parties (b). Indeed, in some cases courts of equity will decree a specific execution, not according to the letter of the contract, if that will be unconscientious; but they will modify it according to the change of circumstances (c).

§ 776. One of the most frequent occasions on which courts of equity are asked to decree a specific performance of contract is, where the terms for the performance and completion of the contract have not, in point of time, been strictly complied with. Time is not generally deemed in equity to be of the essence of the contract for the sale of land, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract (d). And "whatever the leaning of the Court in earlier times may have been, the tendency of the modern cases has been to hold the parties seeking the assistance of the Court on bills for specific performance to the rule of equity, which requires them to be prompt in asking such assistance" (e). Even where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed; and if time was not originally made by the parties of the essence of the contract, yet it may become so by notice, if the other party is afterwards guilty of improper delays in completing the purchase (f). It should be observed that in some cases the nature of the property contracted for makes time of the essence of the contract, as, for instance, if the thing sold is a public-house, or of an uncertain and fluctuating value (g).

§ 777. Courts of equity will also relieve the party vendor, by decreeing a specific performance, where he has been unable to comply with his contract according to the terms of it, from the state of his

(z) *Gilb. Lex Prætor.* 241, 242; *Meredith v. Wynn*, 1 Eq. Abr. 71; s.c. *Prec. Ch.* 312.

(a) *Page v. Broom*, 4 Russ. 6, 19; *ante*, § 772; *post*, § 776.

(b) *Davis v. Hone*, 2 Sch. & L. 347; *Lennon v. Napper*, 2 Sch. & L. 684.

(c) *Davis v. Hone*, 2 Sch. & L. 347.

(d) *Seton v. Slade*, 7 Ves. 265, 2 Wh. & T. L. C. 475; *Wheeler v. D'Esterre*, 2 Dow, 359; *Reuter v. Sala*, 4 C. P. D. 239; *Stickney v. Keeble*, [1915] A. C. 386.

(e) *Wigram, V.C., Southcomb v. Bishop of Exeter*, 6 Hare, 219, 220.

(f) *King v. Wilson*, 6 Beav. 124; *Gee v. Pearse*, 2 De G. & Sm. 325; *Bruner v. Moore*, [1904] 1 Ch. 305; *Stickney v. Keeble*, [1915] A. C. 386.

(g) *Day v. Luhke*, L. R. 5 Eq. 133; *Cowles v. Gale*, L. R. 7 Ch. 12.

title at the time, if he comes within a reasonable time, and the defect is cured (*h*). So, if there has been no unnecessary delay, courts of equity will sometimes decree a specific performance in favour of the vendor, although he was unable to make a good title at the time when action was brought (*i*). So, if the circumstances of the quality or quantity of land are not correctly described, and the misdescription is not very material, and admits of complete compensation, courts of equity will decree a specific performance. In all such cases, courts of equity look to the substance of the contract, and do not allow small matters of variance to interfere with the manifest intention of the parties, and especially where full compensation can be made to the party on account of any false or erroneous description (*k*).

§ 778. But where there is a substantial defect in the estate sold, either in the title itself, or in the representation or description, or the nature, character, situation, extent, or quality of it, which is unknown to the vendee, and in regard to which he is not put upon inquiry, there a specific performance will not be decreed against him (*l*). Upon the like ground a party contracting for the entirety of an estate, will not be compelled to take an undivided aliquot part of it (*m*). A vendor having a partial interest in land and contracting to sell a larger interest, may compel a specific performance, if he can force or obtain the concurrence of all other necessary parties (*n*). But a vendor having no interest therein cannot force the title of a third party upon an unwilling purchaser (*o*). And as a further illustration of the principle that equity regards the substance rather than the letter, a vendor may force a title from himself, if valid, although different from that contracted to be shown (*p*). At law the rule was otherwise (*q*).

§ 778a. And where the plaintiffs, a railway company, agreed with the defendants to execute a branch railway according to specifications furnished by their engineer, and to give a bond to secure the performance of the contract, it was held that the agreement could not be enforced as regards the construction of the railway, because, from the nature of the works, the court could not superintend their execution consistently with public convenience; nor could they enforce the

(*h*) *Guest v. Homfray*, 5 Ves. 818; *Esdaile v. Stephenson*, 1 Sim. & Stu. 122; *Wynn v. Morgan*, 7 Ves. 202; *In re Atkinson v. Hersell*, [1912] 2 Ch. 1.

(*i*) *Hoggart v. Scott*, 1 Russ. & Myl. 293; s.c. *Tamlyn* 500; *Curling v. Flight*, 2 Ph. 613.

(*k*) *Poole v. Shergold*, 1 Cox 273; 2 Bro. C. C. 118; *Casamajor v. Strobe*, 2 M. & K. 706; *Denny v. Hancock*, L. R. 6 Ch. 1. See *ante*, § 141.

(*l*) *Peers v. Lambert*, 7 Beav. 546.

(*m*) *Dalby v. Pullen*, 3 Sim. 29.

(*n*) *Graham v. Oliver*, 3 Beav. 124; *Sidebotham v. Barrington*, 3 Beav. 524; 4 Beav. 110; 5 Beav. 261; *In re Baker and Salmon*, [1907] 1 Ch. 238

(*o*) *In re Bryant and Barningham*, 4 Ch. D. 218.

(*p*) *Games v. Bonner*, 54 L. J. Ch. 517.

(*q*) *Forster v. Hoggart*, 15 Q. B. 155.

plaintiffs' portion of the contract, to procure the land; and they would not therefore decree a part performance of the contract, by the execution of the stipulated bond, if indeed, in any case of the advance of money, and the agreement to execute a bond for its repayment, a court of equity will compel the execution of the bond. The remedy at law would seem ample in all such cases (r).

§ 779. We have thus far principally spoken of cases of actions by the vendor against the purchaser for a specific performance, where the contract has not been, or cannot be, strictly complied with. But actions may also be brought by the purchaser for a specific performance under similar circumstances where the vendor is incapable of making a complete title to all the property sold, or where there has been a substantial misdescription of it in important particulars; or where the terms, as to the time and manner of execution, have not been punctually or reasonably complied with on the part of the vendor. In these and the like cases, as it would be unjust to allow the vendor to take advantage of his own wrong, or default, or misdescription, courts of equity allow the purchaser an election to proceed with the purchase *pro tanto*, or to abandon it altogether. The general rule in all such cases, is that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase-money or compensation, for any deficiency in the title, quantity, quality, description, or other matters touching the estate, unless the granting of this extraordinary remedy should inflict unreasonable hardship upon the seller (s).

§ 779a. The proper construction of the clause that "if any error, misstatement, or omission in the particulars should be discovered, the error should not annul the sale," and similar clauses, has been the subject of much discussion in the courts. The law as laid down by Tindal, C.J., in *Flight v. Booth*; in the following terms, has been universally followed:—"Where the misdescription, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation" (t).

(r) *South Wales Ry. v. Wythes*, 1 Kay & J. 186. See also *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & Giff. 119, cited and followed in *Bellamy v. Debenham*, [1891] 1 Ch. 412, 422.

(s) *Hooper v. Smart*, L. R. 18 Eq. 683; *Horrocks v. Rigby*, 9 Ch. D. 180; *In re G. N. Ry. and Sanderson*, 25 Ch. D. 788; *In re Fawcett and Holmes*, 45 Ch. D. 150; *Rudd v. Lascelles*, [1900] 1 Ch. 815.

(t) 1 Bing. N. C. 370, 377. Approved and followed in *In re Fawcett and Holmes*, 42 Ch. D. 150.

§ 780. Perhaps it may be truly said, that in some of the cases, in which, in former times, the strict terms of the contract, as to time, description, quantity, quality, and other circumstances of the estate sold, were dispensed with, courts of equity went beyond the true limits, to which every jurisdiction of this sort should be confined, as it amounted to a substitution *pro tanto*, of what the parties had not contracted for (*u*). But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the convenience of mankind, as well as to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions (*x*).

§ 781. We have hitherto been considering cases of contracts respecting lands within the reach of the Statute of Frauds. But other cases within the reach of other clauses of the Statute of Frauds have occurred, and may again occur, in which, also, the remedial justice of courts of equity ought to be exerted by decreeing a specific performance of the contemplated act of trust. Thus, if a man, in confidence of the parol promise of another to perform the intended act, should omit to make certain provisions, gifts, or arrangements for other persons, by will or otherwise, such a promise would be specifically enforced in equity against such a promisee; although founded on a parol declaration, creating a trust contrary to the Statute of Frauds; for it would be a fraud upon all the other parties to permit him to derive a benefit from his own breach of duty and obligation (*y*). Therefore, where an executor promised the testator to pay a legacy, and told the testator he need not put it into his will, he was decreed specifically to perform it (*z*). So, where a testator was about altering his will, for fear that there would not be assets enough to pay all the legacies, and his heir-at-law persuaded him not to alter it, promising to pay all the legacies, he was decreed specifically to perform his promise (*a*). And the same result would follow where the party benefited was innocent of the fraud (*b*).

§ 782. These may suffice as illustrations of the class of cases calling for a specific performance, which are within the purview of the Statute of Frauds. And we shall now proceed, in the next place, to a brief statement of the other class of cases already referred to, namely, those where relief is sought under written or parol contracts not within the Statute of Frauds. Many of these cases have already

(*u*) See *Halsey v. Grant*, 13 Ves. 76; *Drewe v. Hanson*, 6 Ves. 678; *Bowyer v. Bright*, 13 Ves. 702; *Chattock v. Muller*, 8 Ch. D. 177.

(*x*) *Drewe v. Hanson*, 6 Ves. 678.

(*y*) *Ante*, § § 64, 256, 439.

(*z*) *Reech v. Kennigate*, Ambler 67; s.c. 1 Ves. 123.

(*a*) *Chamberlaine v. Chamberlaine*, 2 Freem. 34.

(*b*) *Lutterel v. Lord Waltham*, cited 14 Ves. 290; 1 J. & W. 96; *Bulkley v. Wilford*, 2 Cl. & F. 102.

been incidentally taken notice of under the other heads, and especially under the heads of Accident, Mistake, and Fraud (c).

§ 783. Illustrations may easily be put, of cases where no action whatsoever would lie at law between the parties. Thus, if A. should enter into a contract with B., which contract B. should afterwards assign to a third person, there no action would have been maintainable at law before the Judicature Acts by such assignee against A., or by A. against such assignee, on such contract. But a bill in equity would well lie by either of them against the other, either to enforce a specific execution of the contract, or to set it aside in the same manner, and under the same circumstances, as such a bill would lie between the immediate parties to it (d), provided the original contracting parties were parties to the suit, so that all equities could be properly adjusted. We all know, that privity of contract between the parties was, in general, indispensable to a suit at law; but courts of equity act in favour of all persons claiming by assignment under the parties, independent of any such privity (e).

§ 784. Upon similar principles, if a person has, in writing, contracted to sell land, and afterwards refuses to perform his contract, and then sells the land to a purchaser with notice of the contract, the latter will be compelled to perform the contract of his vendor, for he stands upon the same equity; and although he is not personally liable on the contract, yet he will be decreed to convey the land in the same manner as his vendor (f); in other words, he is treated as a trustee of the first vendee. So, if a power is reserved in a marriage settlement, for a *feme covert* to dispose of her separate property, real and personal, courts of equity will enforce the specific performance of it in favour of any party claiming title from her against her husband, although at law it might, in many cases, formerly have been difficult to prevent the latter from exercising power over it (g).

§ 785. The cases of contracts to grant an annuity for a life or lives, and to settle the boundaries between contiguous estates, have been already mentioned as proper matters for an action for specific performance (h). So, where an agreement was made by persons, who were presumptive heirs to another person, to divide the estate equally between them, without any reference to any will which might be made by such person, it was held valid; and that it should be specifically decreed (i). So, contracts to invest money in land, and, on the other

(c) See *ante*, § § 99, 152 to 157, 161, 330, 331.

(d) *Mozhay v. Inderwick*, 11 Jur. 837; *Hacker v. Mid-Kent Ry.*, 11 Jur. N. S. 634; *Fenwick v. Bulman*, L. R. 9 Eq. 165; *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765. See *Holden v. Hayn*, 1 Mer. 47; *Shaw v. Foster*, L. R. 5 H. L. 321.

(e) *Post*, § § 1040, 1057.

(f) *Potter v. Sanders*, 6 Hare 1. See *McCreight v. Foster*, L. R. 5 H. L. 321.

(g) *Power v. Bailey*, 1 Ball & Beat. 49; *Fettiplace v. Gorges*, 3 Bro. C. C. 8; *post*, § § 788, 789, 790.

(h) *Ante*, § § 722, 729, 730.

(i) *Beckley v. Newland*, 2 P. Will. 182; *id.* 606; *ante*, § 265.

hand, to turn land into money, have been held proper for a specific performance. So, a contract to make mutual wills, if one of the parties has died, having made a will according to the agreement, will be decreed in equity to be specifically executed out of assets by the surviving party, if he has enjoyed the benefit of the will of the other party (*k*). So, a general covenant to indemnify a party for the purchase-money due for land, upon an assignment thereof to an assignee, although it sounds only in damages, will be decreed to be specifically performed by the assignee, upon the principle of *quia timet* (*l*).

§ 786. Another curious case, illustrative of the extent to which courts of equity will go to enforce a specific performance of contracts against parties and privies in estate, in cases where a fraudulent evasion is attempted, has been propounded and acted upon in the House of Lords. If a person covenants, or agrees, or in any other manner validly binds himself to give to A., by his will, as much property as he gives to any other child, he may put it out of his power to do so, by giving away all his property in his lifetime. Or, if he binds himself to give to A. as much as he gives to B. by his will, he may, in his lifetime give to B. what he pleases, so as, by his will, he shall give to A. as much as he gives to B. But then the gifts which he makes in his lifetime, to B. must be out and out. For, if to defraud or defeat the obligation which he has thus entered into, he gives to B. any property, real or personal, over which he retains a control, or in which he reserves an interest to himself; then, in order to protect the agreement or obligation which he has entered into, and to defeat the fraud attempted upon that agreement or obligation and to prevent his escaping, as it were, from his own contract, courts of equity will treat this gift to B. in the same manner as if it were purely testamentary, and were included in a will; and the subject-matter of the gift will be brought back and made the fund out of which to perform the obligation. At all events, it will be made the measure for calculating and ordering the performance of, and dealing with, the claim arising under that agreement or obligation (*m*).

§ 787. These cases are sufficient to point out the general course of remedial justice in equity in all cases of specific performance, whether they are within or without the Statute of Frauds. To go over all the doctrines applicable to the subject, in all the varieties, would require a discussion wholly incompatible with the objects of this work. The principles already expounded may serve to explain the true nature and extent of the jurisdiction at present exercised,—a jurisdiction which has been an appropriate theme of praise on all occasions in which the claims of courts of equity to public favour have

(*k*) *Dufour v. Pereira*, cited 3 Ves. 412, 416.

(*l*) *Ante*, § 730; *post*, § 849.

(*m*) *Logan v. Wienholt*, 7 Bligh N. S. 1; 1 Cl. & F. 611. See *In re Parkin Hill v. Schwatz*, [1892] 3 Ch. 510.●

been vindicated by their friends or assailed by their enemies. In conclusion, it may, however, be proper to remark, that all the cases for a specific performance, which we have been examining, presuppose the contract to be between competent parties, and founded upon a valuable and meritorious consideration; for courts of equity will not, as we have seen, and shall presently more fully see (*n*), carry into specific execution any merely *nude pacts* or voluntary agreements, not founded upon some valuable or meritorious consideration; nor between parties not *sui juris* or competent to contract, such as infants (*o*); nor (as we have already seen) any agreements which are against public policy, or are immoral, or which involve a breach of trust (*p*).

§ 788. It may also be stated, that, in general, where the specific execution of a contract respecting lands will be decreed between the parties it will be decreed between all persons claiming under them in privity of estate, or of representation, or of title, unless other controlling equities are interposed (*q*). If a person purchases lands with knowledge of a prior contract to convey them, he is (as we have seen) affected by all the equities which affected the lands in the hands of the vendor (*r*). The lien of the vendor for the purchase-money attaches to them, and such purchaser may be compelled either to pay the purchase-money, or to surrender up the land, or to have it sold for the benefit of the vendor. In this view, the remedy of the vendor against such purchaser may be said to be *in rem*, rather than *in personam*. On the other hand, if the vendee under such a contract conveys the same to a third person, the latter, upon paying the purchase-money, may compel the vendor, and any person claiming under him in privity, or as a purchaser with notice, to complete the contract and convey the title to him (*s*).

§ 789. The general principle upon which this doctrine proceeds, is, that from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor (*t*). And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased (*u*). In cases of this sort, if the original vendee dies, after having sold the lands to a third person, who is to

(*n*) *Ante*, § § 433, 706, 706*a*, 750, 769; *post*, § § 793*a*, 973, 977, 987, 1040.

(*o*) *Flight v. Bolland*, 4 Russ. 298, 301; *ante*, § § 723, 751, note.

(*p*) *Tolson v. Sheard*, 5 Ch. D. 19; *Morris, Lim. v. Sazelby*, [1916] A. C. 688.

(*q*) *Smith v. Hibbard*, 2 Dick. 730. As to what constitutes notice of assignment, preventing the vendor from conveying to original vendee, see *McCreight v. Foster*, L. R. 5 Ch. 604; L. R. 5 H. L. 321; *Crabtree v. Poole*, L. R. 12 Eq. 13.

(*r*) *Potter v. Sanders*, 6 Hare 1.

(*s*) *Winged v. Lefebury*, 2 Eq. Abr. 32, pl. 43; *Taylor v. Stibbert*, 2 Ves. Jun. 437; *Daniels v. Davison*, 16 Ves. 249; s.c. 17 Ves. 433; *ante*, § 784.

(*t*) *Seton v. Slade*, 7 Ves. 264; *Lysaght v. Edwards*, 2 Ch. D. 499; *Clarke v. Ramuz*, [1891] 2 Q. B. 546.

(*u*) *Whitbread & Co. v. Watt*, [1902] 1 Ch. 835.

pay the purchase-money, his personal representatives are entitled to proceed against such purchaser in equity, to indemnify them, and to pay the purchase-money. On the other hand, if the vendor dies, his personal representatives may enforce the lien for the purchase-money against the land in the possession of the purchaser. But who, as between the heirs and personal representatives of the vendee or a subsequent purchaser, is to bear the charge, that is, whether it is to be borne by the personal estate or by the land purchased, is a matter properly belonging to other branches of equity jurisdiction, in which the marshalling of assets is considered (x).

§ 790. There is another consideration which is incident to this subject, and to which courts of equity have given an attention and effect proportioned to its importance. In the view of courts of law, contracts respecting lands, or other things, of which a specific execution will be decreed in equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a present or future charge. But courts of equity regard them in a very different light. They treat them, for most purposes, precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes by descent to his heir as land (y). The vendor is deemed in equity to stand seised of it for the benefit of the purchaser; and the trust (as has been already stated) attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as a purchaser, with notice of the trust (z). The heir of the purchaser may come into equity and insist upon a specific performance of the contract. On the other hand, the vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid; for the remedy, in cases of specific performance, is mutual (a), and the purchase-money is treated as the personal estate of the vendor, and goes as such to his personal representatives. In like manner, land, article or devised to be sold, and turned into money, is reputed as money, and money, article or bequeathed to be invested in land, has, in equity, many of the qualities of real estate, and is descendible and devisable as such, according to the rules of inheritance in other cases (b). So, if a trustee should take property with absolute directions to sell and convert it into money, there, although the directions were not carried into effect during the life of the party creating the trust,

(x) *Roberts v. Marchant*, 1 Ph. 370; *Hoddel v. Pugh*, 33 Beav. 489.

(y) *Seton v. Slade*, 7 Ves. 264, 274; *post*, § 1212.

(z) *Ante*, §§ 788, 789.

(a) *Ante*, § 723; *post*, § § 796, 1212.

(b) *Fletcher v. Ashburner*, 1 Bro. C. C. 496.

the property would be deemed personalty. But if the charge is not absolute, as if a testator should charge his real estate for the payment of his debts, it will retain its character as real estate, so far as the charge does not extend, until it is actually converted (c). The like rule will apply to the case of real estate, conveyed by way of mortgage with a power upon default of payment to sell the premises, and pay over the residue to the mortgagor, after payment of the mortgage; there, if no sale should be made until after the death of the mortgagor, it will pass by his devise to his devisee, or to his heir, as real estate, and not as personalty (d).

§ 791. The ground of this latter doctrine is, that courts of equity will regard the substance, and not the mere form, of agreements and other instruments; and will give them the precise effect which the parties intended, in furtherance of that intention. It is presumed that the parties, in directing money to be invested in land, or land to be turned into money, intend that the property shall assume the very character of the property into which it is to be converted, whatever may be the manner in which that direction is given. And no one will deny that it is competent, at least in a court of equity, for the owner of the fund to make land money, or money land, at his sole will and pleasure.

§ 792. But, although these are the general principles adopted by courts of equity, yet they are not without limitations and qualifications, standing upon peculiar reasons, but still consistent with those principles. Thus (as we have seen), nothing is looked upon in equity, as done, but what ought to be done; not what might have been done. Nor will equity consider things as thus done in favour of everybody; but only in favour of those who have a right to pray that they might be done.

§ 793. Upon the ground of intention, also, if it can be collected from any present or subsequent acts of the parties, that it is their intention, notwithstanding any will, or deed, or other instrument, that the property shall retain its present character, either in whole or in part, courts of equity will act upon that intention (e). Thus, for instance, if money is directed by will, or other instrument, to be laid out in land, or land is directed to be turned into money, the party entitled to the beneficial interest may in either case, if he elects so to do, prevent any conversion of the property from its present state, and hold it as it is. And this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by an application to a court of equity (f). It is this election, however,

(c) *In re Goswell's Trusts*, [1915] 2 Ch. 106.

(d) *Bourne v. Bourne*, 2 Hare, 38.

(e) *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Wheldale v. Partridge*, 8 Ves. 227; *Mutlow v. Bigg*, 1 Ch. D. 385.

(f) *Seeley v. Jago*, 1 P. Will. 389, where Lord Chancellor Cowper said, "It is

and not the mere right to make it, which changes the character of the estate, so as to make it real or personal at the will of the party entitled to the whole beneficial interest. If he does not make such an election in time to stamp the property with a character different from that which the will or other instrument gives it, the latter character accompanies it, with all its legal consequences, into the hands of those who are entitled to it in that character. So that, in case of the death of the party thus beneficially entitled, without having made an election, the property will pass to his heirs, or personal representatives, in the same manner it would have done if the trust had been executed and the conversion had been actually made in his lifetime (*g*).

§ 793*a*. We have already had occasion to remark, throughout the whole of the discussion, respecting actions for specific performance of contracts, that it has been constantly supposed that the contract was one founded upon a valuable consideration in the contemplation of law (*h*). In respect to voluntary contracts, or such as are not founded in a valuable consideration, we have already had occasion to state, that courts of equity do not interfere to enforce them, either as against the party himself or as against other volunteers claiming under him (*i*). Thus, for example, if a party should enter into a voluntary agreement to transfer stock to another, or to give him a sum of money, or to convey to him a certain real estate, courts of equity would not assist in enforcing the agreement, either against the party entering into the agreement, or against his personal representatives; for the party contracted with is a mere volunteer. The same rule is applied to imperfect gifts, *inter vivos*, to imperfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary defective conveyances (*k*).

vain to lay out this money on land for B. and C., when the next moment they may turn it into money; and equity, like nature, does nothing in vain."

(*g*) *Smith v. Claxton*, 4 Madd. 484; *Jessop v. Watson*, 1 M. & K. 665; *In re Richerson, Scales v. Heyhoe*, [1891] 1 Ch. 379.

(*h*) *Ante*, § 787.

(*i*) *Ante*, § § 706, 706*a*, 787; *Tate v. Hilbert*, 2 Ves. Jun. 112; *Jeffreys v. Jeffreys*, 1 Cr. & Phil. 136, 141; *Meek v. Kettlewell*, 1 Phil. 342.

(*k*) *Ellison v. Ellison*, 6 Ves. 662; *Ex parte Pye*, 18 Ves. 149; *Edwards v. Jones*, 1 Myl. & Cr. 226; *Weale v. Ollive*, 17 Beav. 252; *Green v. Paterson*, 32 Ch. D. 95.

CHAPTER XVIII.

COMPENSATION AND DAMAGES.

§ 794. It is in cases of bills brought for a specific performance that questions principally (although not exclusively) arise, as to compensation and damages being awarded by courts of equity; and therefore it is convenient in this place to consider the nature and extent of the jurisdiction exercised by courts of equity as to compensation and damages (*a*). It may be stated as a general proposition, that, for breaches of contract, and other wrongs and injuries, cognizable at law, courts of equity did not entertain jurisdiction to give redress by way of compensation or damages, where these constituted the sole objects of the bill (*b*). For, wherever the matter of the bill was merely for damages, and there was a perfect remedy therefor at law, it was considered far better that they should be ascertained by a jury than by the conscience of an equity judge (*c*). And indeed the just foundation of equitable jurisdiction failed in all such cases, as there was a plain, complete, and adequate remedy at law. Compensation or damages could be and were decreed in equity but only as incidental to other relief sought by the bill and granted by the court; or where there is no adequate remedy at law; or where some peculiar equity intervened (*d*). Thus, for example, if, pending a suit for a specific performance of an agreement for a demise of quarries, a part of the subject-matter of the demise is abstracted, compensation might under the old practice have been obtained therefor by a supplemental bill (*e*).

§ 795. The mode by which such compensation or damages used to be ascertained was either by a reference to a master, or by directing an issue, *quantum damnificatus*, which was tried by a jury. The latter used to be almost the invariable course in former times, in all cases where the compensation was not extremely clear as to its elements and amounts. But the same inquiries may be had before a

(*a*) The same principle of compensation and damages is applied in granting relief against penalties and forfeitures, as will be seen in a future page.

(*b*) *Higginbotham v. Hawkins*, L. R. 7 Ch. 676; *Morgan v. Larivière*, L. R. 7 H. L. 423.

(*c*) Gilb. For. Rom. ch. 12, p. 219; *Clifford v. Brooke*, 13 Ves. 130, 131, 134; *Bloue v. Sutton*, 3 Meriv. 247, 248; *Newham v. May*, 13 Price, 749, 752.

(*d*) *Newham v. May*, 13 Price, 732; *Clifford v. Turrell*, 1 Y. & C. Ch. 138; on appeal, 14 L. J. Ch. 390.

(*e*) *Nelson v. Bridges*, 2 Beav. 239.

master; and in cases where such inquiries do not involve much complexity of facts or amounts, this course is now often adopted (*f*). Or the damages may be assessed by the court at the hearing, and if the plaintiff is not ready with his evidence, the trial has been adjourned to give him time to obtain the necessary evidence (*g*).

§ 796. Wherever compensation or damages are incidental to other relief, as, for instance, where a specific performance is decreed upon the application of either party, with an allowance to be made for any deficiency as to the quantity, quality, or description of the property, or for any delay in performing the contract; there, it seems clear, that the jurisdiction properly attaches in equity; for it flows, and is inseparable from the proper relief (*h*). So, where an action is brought by the vendor against the vendee for specific performance of the contract of sale, and of payment of the purchase-money, if the judgment is for a specific performance, equity will decree the payment of the purchase-money also, as the remedies of the parties must be mutual, although the vendor might in many cases have a good remedy at law for the purchase-money (*i*). The learned author then discussed certain doubts that had been expressed by Lord Eldon, Lord Redesdale, and Sir William Grant, M.R., which after his day had been set at rest by subsequent decisions to which reference has already been made in this chapter, and which have long since possessed but an historical interest by reason of legislation.

§ 796*a*. By the Chancery Amendment Act, 1858, still usually referred to as Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2, it was enacted that in all cases in which the court had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, in all these cases it should be lawful for the same court, *if it should think fit*, to award damages to the party injured, either in addition to, or in substitution for, such injunction, and such damages might be assessed in such manner as the court should direct. This statute has been repealed but with the saving of "any jurisdiction or principle, or rule of law or equity established or confirmed" by it, by the Statute Law Revision Act, 1881 (44 & 45 Vict. c. 59). The statute does not confer an original jurisdiction to award damages, and if the right to specific performance

(*f*) *Gilb. For. Rom.* 219; *Denton v. Stewart*, 1 Cox 258; *Greenaway v. Adams*, 12 Ves. 401, 402; *Todd v. Gee*, 17 Ves. 278, 279.

(*g*) *Higginbotham v. Hawkins*, L. R. 7 Ch. 676; *Jacques v. Millar*, 6 Ch. D. 153; *Wesley v. Walker*, 26 W. R. 368. Lord Justice Fry recommends in his book on Specific Performance, 2nd edit. p. 555, that this last course should whenever practicable be adopted.

(*h*) *Ante*, §§ 709, 711.

(*i*) *Withy v. Cottle*, 1 Sim. & Stu. 174; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Clifford v. Turrell*, 1 Y. & C. Ch. 138, affirmed 14 L. J. Ch. 390.

has been lost, as by laches, the right to damages under the Act falls with it (*k*).

§ 796b. The Supreme Court established by the Judicature Act, 1873 (36 & 37 Vict. c. 66), is, as has been already stated (*l*), a court of complete jurisdiction, and where a party would have failed to establish his claim to relief in equity and have been awarded damages in a court of law, the court should at once proceed to give him his alternative remedy (*m*).

(*k*) *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Lavery v. Pursell*, 39 Ch. D. 508.

(*l*) *Ante*, § 48.

(*m*) *Tamplin v. James*, 15 Ch. D. 215. This decision has sometimes been overlooked in practice; *e.g.*, *Lavery v. Pursell*, 39 Ch. D. 508; *Scott v. Alvarez*, [1915] 2 Ch. 603.

CHAPTER XIX.

INTERPLEADER.

§ 800. WITH these remarks on the jurisdiction of courts of equity, as to specific performance, and compensation and damages, we may dismiss the subject, and proceed to another head of concurrent equitable jurisdiction, arising principally from the peculiar remedies administered therein; and that is, INTERPLEADER. A learned author has treated this, and one other branch of equity jurisprudence (that of interference in cases of irreparable mischief and injury), as not strictly belonging either to the concurrent, or the exclusive, or the auxiliary jurisdiction of courts of equity. Perhaps, in strictness, this may be correct, but it more nearly falls within the first than within either of the others (*a*). Having regard to the enlarged jurisdiction of the Supreme Court, it will be unnecessary to discuss the limits within which courts of equity entertained bills of interpleader with the same particularity as the learned author.

§ 801. The remedy by interpleader was not unknown to the common law; but it had a very narrow range of purpose and application. The interpleader at law was where there was a joint bailment by both claimants (*b*). It was a common practice, in the early times of the English law, for parties, by joint agreement, to deposit title-deeds, and other deeds and things, in the hands of third persons, to await the performance of covenants, or the doing of some other act, upon which they were to be redelivered to one or the other of the parties. It often happened, under such circumstances, that questions subsequently arose, whether the act had been properly performed, or the terms strictly complied with; and if, when either party supposed the crisis, on which the deed or thing was demandable, to have arrived, any dispute existed, as to the right, or as to the fact, an action of detinue (the appropriate action for such a case) became inevitable. Now, by the common law, in such a case, the depositary might, if such an action was brought against him, plead for his protection the fact of such delivery or bailment upon certain conditions, and his willingness to deliver the property to the party entitled to it, and his ignorance whether the condition were performed or not; and

(*a*) Cooper, Eq. Pl. Introd. p. 85.

(*b*) *Crawshay v. Thornton*, 2 Myl. & Cr. 1, 21.

thereupon he might pray, that a process of garnishment (that is, a process of monition or notice) might issue to compel the other depositor to appear and become a defendant in his stead. This was properly called the process of garnishment.

§ 802. The process of interpleader was very nearly allied to that of garnishment; and it arose, when both of the parties, who concurred in a joint bailment, brought several actions of detinue against the depositary, under like circumstances, for a redelivery of the thing deposited. The depositary might then plead the facts of the case, and pray that the plaintiffs in the several actions might interplead with each other. This was properly the process of interpleader. The proceeding seems highly reasonable in itself, to prevent the depositary from being harassed by suits in which he had no interest.

§ 803. The same process was also applied to cases where the thing in controversy came to the possession of the depositary by finding, and he was sued in detinue by different persons, each claiming to be the owner in severalty. And it seems also to have been applied to cases of a bailment by A., to the depositary to rebail to B.; where both A. and B. sued the depositary in detinue. But if there was no privity between the parties, but each plaintiff counted upon a several independent bailment against the depositary, there, it was said, the plaintiffs were not compellable to interplead, for it was the depositary's own folly, and he must abide by it (*c*).

§ 804. The remedy, however, such as it was, was principally confined to actions of detinue, although it was applied to a few other cases, such as writs of *quare impedit*, and writs of right of ward. But it was not allowed to any personal action except detinue; and then only, as we have seen, when it was founded either in privity of contract, or upon a finding.

§ 805. From this description of the process of interpleader at the common law, it is obvious that it could afford a very imperfect remedy in a great variety of cases. Indeed, as the action of detinue was subsequently supplanted by the action of trover (in which interpleader did not lie at the common law), little or no practical advantage could be derived from it in modern times (*d*). The only remedy, therefore, for the relief of a person sued, or in danger of being sued, by several claimants of the same property, was that of filing a bill to compel them, by the authority of a court of equity, to interplead, either at law or in equity (*e*).

(c) Reeves, Hist. of the English Law, ch. 23, pp. 453, 454. See *Rich v. Aldred*, 6 Mod. 216; Story on Bailments, §§ 111, 112. (d) Cooper, Eq. Pl. 47, 48, 49.

(e) The reader is referred to the able Report of the Common Law Commissioners made to Parliament, and printed by the order of the House of Commons, in March, 1830 (p. 24), for further information on this subject. Mr. Reeves has, in his History of the English Law (vol. iii. pp. 448 to 455), brought together some of the cases of difficulty in the proceeding of interpleader at the common law. They abundantly show the inadequacy of the remedy.

§ 806. It is observable, that the jurisdiction of courts of equity, to compel an interpleader, followed, to some extent, the analogies of the law (f). It was properly applied to cases where two or more persons severally claimed the same thing under different titles, or in separate interests, from another person, who, not asserting any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, was either molested by an action or actions brought against him, or feared that he might suffer injury from the conflicting claims of the parties. He, therefore, applied to a court of equity to protect him, not only from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits, which were, or possibly might be, instituted against him (g).

§ 807. The true origin of the jurisdiction is, that there either was no remedy at all at law, or the legal remedy was inadequate in the given case. If an interpleader at law would lie in the case, and it would be effectual for the protection of the party, then the jurisdiction in equity failed. So, if the party himself, seeking the aid of the court by bill of interpleader, claimed an interest in the subject-matter, as well as the other parties, there was no foundation for the exercise of the jurisdiction; for, in such a case, he had other appropriate remedies. So, if the plaintiff had lent himself in any way to further the claims of either party to the fund in controversy, or to aid one in obtaining possession thereof, to the exclusion of the other, he could obtain no relief by this bill. For a bill of interpleader always supposed that the plaintiff was the mere holder of a stake, which was equally contested by the other parties, and as to which the plaintiff stood wholly indifferent between them; so that when their respective rights were settled, nothing further remained in controversy. But that could never be truly said to be the case, when the plaintiff asserted a personal right or claim, which remained to be settled between him and the other parties; or the plaintiff sought relief in the premises against either of them (h). The true ground upon which the plaintiff came into equity was, that, claiming no right in the subject-matter himself, he was, or might be, vexed by having two legal or other processes, in the names of different persons, going on against him at the same time. He came, therefore, into court upon the most obvious equity, to insist that those persons, claiming that to which he made no claim, should settle that contest among themselves, and not with him or at his expense and hazard (i). If their respective titles were

(f) See *Metcalf v. Hervey*, 1 Ves. Sen. 249.

(g) *Moore v. Usher*, 7 Sim. 383; *Crawshay v. Thornton*, 2 M. & Cr. 1; *Glyn v. Duesbury*, 11 Sim. 139.

(h) *Mitchell v. Hayne*, 2 Sm. & Stu. 63; *Moore v. Usher*, 7 Sm. 383.

(i) *Langston v. Boylston*, 2 Ves. Jun. 109.

doubtful, there was so much the more reason why he should not be harassed by suits to ascertain and fix them; and unless, under such circumstances, courts of equity afforded him protection, he would, in almost every event, be a sufferer, however innocent and honourable his own conduct may have been.

§ 808. In regard to bills of interpleader, it was not necessary, to entitle the party to come into equity, that the titles of the claimants should be both purely legal or both purely equitable; it was sufficient to found the jurisdiction that one title was legal and the other was equitable (*k*). Indeed, where one of the claims was purely equitable, it seemed indispensable to come into equity; for, in such a case, there could be no interpleader awarded at law (*l*). Thus, for instance, if a debt or other claim had been assigned, and a controversy arose between the assignor and the assignee respecting the title, a bill of interpleader might have been brought by the debtor, to have the point settled, to whom he should pay (*m*). Where the title of all the claimants was purely equitable, there was a still broader ground to entertain bills in the nature of a bill of interpleader; for courts of equity, in virtue of their general jurisdiction, might grant relief in such cases. Nor was it necessary (as may be gathered from what has been already said) that a suit should have been actually commenced by either or both of the conflicting claimants, against the party, either at law or in equity. It was sufficient that a claim was made against him, and that he was in danger of being molested by conflicting rights (*n*).

§ 809. But in every case of a bill of interpleader, the court, in order to prevent its being made the instrument of delay or of collusion with one of the parties, required that an affidavit of the plaintiff should be made, that there was no collusion between him and any of the other parties; and, also, if it was a case of money due by him, that he should bring the money into court; or, at least, should offer to do so by the bill (*o*). An affidavit of no collusion was conclusive, the question could only be raised at the hearing, but where charged. an undertaking in damages by the plaintiff might be required (*p*).

§ 812. And here it may be proper to state, that, in the cases of tenants seeking relief by bill of interpleader, it must have appeared that the persons claiming the same rent, claimed in privity of contract or tenure, as in the case of a mortgagor and mortgagee, or of a trustee

(*k*) *Paris v. Gilham*, 9 Coop. Eq. 56; *Morgan v. Marsack*, 2 Meriv. 107.

(*l*) *Duke of Bolton v. Williams*, 4 Bro. C. C. 309; s.c. 2 Ves. Jun. 151, 152.

(*m*) See *Wright v. Ward*, 4 Russ. 215; *Lowndes v. Cornford*, 18 Ves. 299.

(*n*) *Langston v. Boylston*, 2 Ves. Jun. 107; *Morgan v. Marsack*, 2 Meriv. 107; *Fairbrother v. Prattent*, 5 Price, 303; s.c. Dan. 64, 70; *Jones v. Thomas*, 2 Sm. & G. 186.

(*o*) *Dungey v. Angove*, 3 Bro. C. C. 36; 2 Ves. Jun. 310; *Langston v. Boylston*, 2 Ves. Jun. 109, 110; *Warrington v. Wheatstone*, Jac. 202.

(*p*) *Dungey v. Angove*, 1 Bro. C. C. 36; 2 Ves. Jun. 310; *Manby v. Robinson*, L. R. 4 Ch. 347.

and *cestui que trust*; or, where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband had been in receipt of the rent. In cases of this sort, the tenant does not dispute the title of his landlord; but he affirms that title, and the tenure and contract, by which the rent is payable; and puts himself upon the mere uncertainty of the person to whom he is to pay the rent. But if a claim to the rent should be set up by a mere stranger, under a title paramount, and not in privity of contract or tenure (as, if the stranger should bring ejectment against the tenant), there the tenant cannot compel his landlord to interplead with such a stranger; for it is not a demand of the same nature, or in the same right. The stranger cannot demand the rent as such, but he has, if successful in the ejectment, only a right to damages for use and occupation; whereas the landlord claims the rent, as such, in privity of contract, tenure, and title. The debt or duty is not the same; and interpleader lies only, when it is so, or in privity (*q*). And the same principle was applied where the plaintiff had attorned in respect of goods (*r*).

§ 813. These last cases may serve as proofs of the truth of the remark already made, that equity, in bills of interpleader, followed to some extent the analogies of the law; for we have seen that privity of contract was generally necessary to found a jurisdiction at law in cases of bailment upon a writ of interpleader. But in many other respects, the bill of interpleader in equity differed from that of law. In all the cases above mentioned no interpleader would lie at law; for they involved no mutual or joint bailment, and no claim, founded upon a finding by the plaintiff.

§ 814. What the true limit of the jurisdiction upon bills of interpleader was, in cases where different persons claimed the same specific chattel or thing from a third person upon the ground of title as owners, is not a matter, perhaps, settled by the authorities in a very precise manner. In general, this remedy could be claimed by persons standing in the situation of mere stakeholders, such as auctioneers, agents, factors, and consignees, between whom and the different claimants there was a privity of contract or duty (*s*); but the agent might be precluded from setting up the title of others by distinctly recognizing the title of one (*t*). But this qualification has ceased to exist by force of the statutory amendment of the law (*u*). There does not seem any difficulty, upon principle, in maintaining that a bill of interpleader may be brought by a stakeholder against three

(*q*) *Dungey v. Angove*, 1 Bro. C. C. 36; 2 Ves. Jun. 310, 312; *Homan v. Moore*, 4 Price, 1.

(*r*) *Crawshay v. Thornton*, 2 M. & Cr. 1. See *Nickolson v. Knowles*, 5 Madd. 47.

(*s*) *Fairbrother v. Prattent*, Dan. 64; *Hoggart v. Cutts*, Cr. & P. 197.

(*t*) *Nickolson v. Knowles*, 5 Madd. 47; *Crawshay v. Thornton*, 2 M. & Cr. 1.

(*u*) *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450.

persons, each claiming, in a distinct and different right, the same property, as well as against two persons claiming in the same manner (x).

§ 821. A bill of interpleader could not be maintained by any person who did not admit a title in two claimants, and did not also show two claimants in existence capable of interpleading (y). Thus, a sheriff, who seized goods in execution, could not sue a bill of interpleader upon account of adverse claims existing to the property; for, as to one of the defendants, he necessarily admitted himself to be a wrongdoer (z). It was essential, also, in every bill of interpleader, that the plaintiff should show that each of the defendants claimed a right, and such a right as they might interplead for; for otherwise both the defendants might demur; the one, because the bill showed no claim of right against him; the other, because the bill, showing no claim of right in the co-defendant, showed no cause of interpleader (a).

§ 824. But although a bill of interpleader, strictly so called, lay only where the party applying claimed no interest in the subject-matter; yet there were many cases where a bill, in the nature of a bill of interpleader, would lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons (b). In these cases, the plaintiff sought relief for himself, whereas in an interpleading bill, strictly so called, the plaintiff only asked that he might be at liberty to pay the money or deliver the property to the party to whom it of right belonged, and might, thereafter, be protected against the claims of both. In the latter case the only decree to which the plaintiff was entitled, was a decree that the bill was properly filed; or, in other words, that he should be at liberty to pay the money, or bring the property into court, and have his costs, and that the defendants interplead, and settle the conflicting claims between themselves.

§ 824b. Interpleader is now regulated by the Rules of the Supreme Court, 1883, Ord. LVII. The Order enacts as follows:—
1. Relief by way of interpleader may be granted (a) Where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels (c), for or in respect

(x) *Hoggart v. Cutts*, 1 Cr. & Phil. 197.

(y) *East and West India Dock Co. v. Little Dale*, 7 Hare, 57; *Desborough v. Harris*, 5 De G. M. & G. 439. As to the latter decision, see 59 Vict. c. 8.

(z) *Slingsby v. Boulton*, 1 Ves. & B. 334. But a bill by the sheriff against the execution creditor and the assignee in bankruptcy of the execution debtor was maintained in *Child v. Mann*, 3 Eq. 806, and since the 1 & 2 Will. 4, c. 58, he has had the right to interplead. See *infra*, § 824b.

(a) The language of the Common Law Commissioners, in the Report to Parliament, March, 1830, p. 24, is: "The only course now resorted to for the relief of a person sued, or in danger of being sued, by several claimants, is that of filing a bill to compel the parties, by the authority of a court of equity, to interplead at law."

(b) *Vyvian v. Vyvian*, 4 De G. F. & J. 183.

(c) In *Robinson v. Jenkins*, 24 Q. B. D. 275, it was held that shares are chattels and can be the subject of interpleader.

of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto; (b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued. 2. The applicant must satisfy the court or a judge, by affidavit or otherwise—(a) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and (b) That the applicant does not collude with any of the claimants; and (c) That the applicant is willing to pay or transfer the subject-matter into court, or to dispose of it as the court or a judge may direct. 3. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another.

CHAPTER XX.

BILLS QUIA TIMET.

§ 825. In the next place, let us proceed to the consideration of another class of cases, where the peculiar remedies administered by courts of equity constitute the principal, although not the sole, ground of jurisdiction, and that is, BILLS QUIA TIMET (*a*). We have already had occasion, in another place, to explain, in some measure, the nature of these bills and the origin of the appellation, and to show their application to cases of covenants and contracts with sureties and others, where a specific performance is necessary to prevent future mischief. They are called (as we have seen) *Bills Quia timet*, in analogy to certain writs of the common law, whose objects are of a similar nature. Lord Coke has explained this matter very clearly in his *Commentary on Littleton*. “And note” (says he) “that there be six writs in law that may be maintained, *Quia timet*, before any molestation, distress, or impleading. As, (1) A man may have a *Writ of Mesne* (whereof Littleton here speaks) before he be distrained; (2) A *Warrantia chartæ*, before he be impleaded; (3) A *Monstraverunt*, before any distress or vexation; (4) An *Audita querela*, before any execution sued; (5) A *Curia claudenda*, before any default of inclosure; (6) A *Né injuste vexes*, before any distress or molestation. And these be called *Brevia anticipantia*, writs of prevention (*b*).

§ 826. Now, bills in equity, *Quia timet*, answer precisely to this latter description. They are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are, ordinarily, applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation or other relief. The manner in

(*a*) *Ante*, § § 701 to 710, 730. See also 1 *Mad. Ch. Pr.* 178, 179; *Vin. Abr. tit. Quia timet*, A. and B. These would now take the form of an action in the Chancery Division in the nature of a bill *Quia timet*.

(*b*) *Co. Litt.* 100 *a*. The writ of *Audita querela* was abolished by Order XLII. s. 22, of the *Judicature Act*, 1873, but by the same section it was provided that any party against whom judgment has been given might apply to the court for a stay of execution or other relief against such judgment on the ground of facts which have arisen too late to be pleaded, and such relief may be given as to the court shall seem fit.

which this aid is given by courts of equity is, of course, dependent upon circumstances. They interfere sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere issuing of an injunction or other remedial process, thus adapting their relief to the precise nature of the particular case and the remedial justice required by it. In *Fletcher v. Bealey* (c), Mr. Justice Pearson explained the law as to actions *Quia timet* as follows:—"There are at least two necessary ingredients for a *Quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *Quia timet* action."

§ 827. In regard to equitable property, the jurisdiction is equally applicable to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future or contingent. The object of the bill in all such cases is to secure the preservation of the property to its appropriate uses and ends; and wherever there is danger of its being converted to other purposes, or diminished, or lost by gross negligence, the interference of a court of equity becomes indispensable. It will, accordingly, take the fund into its own hands, or secure its due management and appropriation, either by the agency of its own officers or otherwise. Thus, for instance, if property in the hands of a trustee for certain specific uses or trusts (either expressed or implied) is in danger of being diverted or squandered to the injury of any claimant having a present or future fixed title thereto, the administration will be duly secured by the court, according to the original purposes, in such a manner as the court may, in its discretion, under all the circumstances, deem best fitted to the end; as by the appointment of a receiver, or by payment of the fund, if pecuniary, into court, or by requiring security for its due preservation and appropriation.

§ 828. The same principle is applied to the cases of executors and administrators, who are treated as trustees of the personal estate of the deceased party. If there is danger of waste of the estate, or collusion between the debtors of the estate and the executors or administrators, whereby the assets may be subtracted, courts of equity

(c) 28 Ch. D. 688; see p. 698. In this case, applying the above rule, the claim for an injunction was dismissed, but without prejudice to the right of the plaintiff to bring another action in case of actual injury or imminent danger.

will interfere and secure the fund; and, in case of collusion with debtors, they will order the latter if parties to the suit to pay the amount of their debts into court (*d*). Or they may appoint a receiver (*e*).

§ 829. The appointment of a receiver, when directed, is made for the benefit and on behalf of all the parties in-interest, whether parties to the suit or not, and not for the benefit of the plaintiff or of one defendant only (*f*). It may be granted in any case of equitable property, upon suitable circumstances. Thus, where there are creditors, annuitants, and others, some of whom are creditors at law, claiming under judgments, and others are creditors claiming upon equitable debts; if the property be of such a nature that, if legal, it may be taken in execution, it may, if equitable, be put into the possession of a receiver, to hold the same, and apply the profits, under the direction of the court, for the benefit of all the parties, according to their respective rights and priorities (*g*). The same rule applies to cases where the property is legal, and judgment creditors have taken possession of it under prior writs of execution; for it is competent for the court to appoint a receiver in favour of annuitants and equitable creditors, not disturbing the just prior rights, if any, of the judgment creditors (*h*). Hence, the appointment of a receiver, in cases of this sort, is often called an equitable execution. But in a very late case (*i*) it was held by the Court of Appeal that the use of the term “equitable execution” tends to error. What a person obtains “by the appointment of a receiver, is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law.”

§ 830. It has been said that the general rule of equity, to appoint a receiver for an equitable creditor against a person having an equitable estate, without prejudice to persons who have prior estates, is to be understood in this limited sense, that it is to be without prejudice to persons having prior legal estates, and so that it will not prevent their proceeding to obtain possession from the court if they think proper. And, with regard to persons having prior equitable estates,

(*d*) *Manton v. Manton*, 40 L. J. Ch. 93; *In re Beeny, Ffrench v. Sproston*, [1894] 1 Ch. 499; *ante*, § § 422, 423, 424, 581, and note; *post*, § 836.

(*e*) *Bainbrigge v. Blair*, 3 Beav. 421.

(*f*) *Davis v. Duke of Marlborough*, 1 Swanst. 83; s.c. 2 Swanst. 125; *Neate v. Pink*, 3 Mac. & G. 476; *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

(*g*) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Smith v. Cowan*, 6 Q. B. D. 75; *Searle v. Choat*, 25 Ch. D. 723.

(*h*) *Davis v. Duke of Marlborough*, 1 Swanst. 83; s.c. 2 Swanst. 125, 135, 139, 140, 141, 145, 173; *White v. Bishop of Peterborough*, 3 Swanst. 117, 118.

(*i*) *In re Shephard, Atkins v. Shephard*, 431 Ch. D. 131, per Cotton, L. J., at p. 135. In that case it was held that a receiver could not be appointed of the equitable estate of a judgment debtor, who was dead at the time the order for a receiver was made, in the absence of any person to represent his estate.

the court will take care, in appointing a receiver, not to disturb their prior equities; and, for that purpose, it will direct inquiries to determine the priorities among equitable incumbrancers, permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors (*k*).

§ 831. The appointment of a receiver is a matter resting in the sound discretion of the court and the power conferred upon the Supreme Court by the Judicature Act, 1873, s. 25, sub-s. 8, wherever it is just or convenient to do so, has not altered the principles upon which the court of chancery formerly acted (*l*). The receiver, when appointed, is treated as virtually an officer of the court, and subject to its orders (*m*). Lord Hardwicke considered this power of appointment to be of great importance, and most beneficial tendency; and he significantly said: "It is a discretionary power, exercised by the court, with as great utility to the subject as any authority which belongs to it; and it is provisional only, for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled; and it does not at all affect the right" (*n*).

§ 832. The exercise of the power being thus discretionary, it would be difficult, with any precision, to mark out the limits within which it is ordinarily circumscribed, even if such a task were within the scope of these Commentaries. As, however, the equitable rights and incidents to such an appointment are often highly important to the parties in interest, and may affect the rights and remedies of third persons having adverse claims, it will be proper in this place to state some of the principles by which this discretion is regulated.

§ 833. Before doing so, it may not be without use to suggest what some of those rights and incidents are; and the more so, as similar rights and incidents belong to cases of sequestration (*o*). In the first place, upon the appointment of a receiver of the rents and profits of real estate, if there are tenants in possession of the premises, they are compellable to attorn; and the court thus becomes virtually, *pro hac vice*, the landlord (*p*). In the next place, the appointment of such a receiver is generally deemed to entitle him to possession of the premises. It does not, indeed, in all cases, amount to a turning of the other party out of possession; for, in many cases, as in the case of an infant's estate, the receiver's possession is that of the infant. But where the rights are adverse in the different parties in the suit, the possession of the receiver is treated as the possession of the party who

(*k*) Lord Eldon, in *Davis v. Duke of Marlborough*, 2 Swanst. 145, 146; *Searle v. Choat*, 25 Ch. D. 723.

(*l*) *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

(*m*) *Angel v. Smith*, 9 Ves. 335; *Hutchinson v. Massareene*, 2 Ball & Beat. 55.

(*n*) *Skip v. Harwood*, 3 Atk. 564.

(*o*) *Angel v. Smith*, 9 Ves. 338. See *In re Hoare*, *Hoare v. Owen*, [1892] 3 Ch. 94.

(*p*) *Sharp v. Carter*, 3 P. Will. 379.

ultimately establishes his right to it. The receiver, however, cannot proceed in any ejectment against the tenants of any estate, except by the authority of the court (*q*). Nor will the possession of the tenants be ordinarily disturbed by the court, where a receiver is appointed.

§ 833 *a*. In the next place, a receiver, when in possession, has very little discretion allowed him; but he must apply, from time to time, to the court for authority to do such acts as may be beneficial to the estate. Thus, he is not at liberty to bring or to defend actions; or to let the estate; or to lay out money; unless by the special leave of the court (*r*). In the next place, when such a receiver is in possession, under the process or authority of the court, in execution of a judgment or order, his possession is not to be disturbed, even by an ejectment under an adverse title, without the leave of the court. For his possession is deemed the possession of the court; and the court will not permit itself to be made a suitor in a court of law (*s*). The proper and usual mode adopted under such circumstances, is, for the party, claiming an adverse interest, to apply to be permitted to intervene *pro interesse suo*. He is then allowed to enforce his rights (if any) according to the evidence which he adduces (*t*).

§ 834. Let us now proceed to consider some of the cases, in which a receiver will be appointed. We have already seen, that, in cases of *elegit* and conflicting legal equitable debts and charges upon the estate, it is a common course to appoint a receiver, for the benefit of all concerned (*u*). In cases, also, where an estate is held by a party, under a title obtained by fraud, actual or constructive, a receiver will be appointed (*x*). And also where the interest of a judgment debtor is not legal, but equitable. In this case the appointment of a receiver acts as an equitable execution (*y*).

§ 835. But it is not infrequent for a bill *Quia timet* to ask for the appointment of a receiver against a party who is rightfully in possession, or who is entitled to the possession of the fund, or who has an interest in its due administration. In such cases, courts of equity will pay a just respect to such legal and equitable rights and interests of the possession of the fund, and will not withdraw it from him by the appointment of a receiver, unless the facts, averred and established in proof, show that there has been an abuse, or is danger of abuse, on

(*q*) *Wynn v. Lord Newborough*, 3 Bro. C. C. 88; s.c. 1 Ves. Jun. 164.

(*r*) *Bristowe v. Needham*, 2 Ph. 170; *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

(*s*) *Angel v. Smith*, 9 Ves. 335; *Russell v. East Anglian Ry.*, 3 Mac. & G. 104.

(*t*) *Searle v. Choat*, 25 Ch. D. 723.

(*u*) *Ante*, § 829.

(*x*) *Huguenin v. Baseley*, 13 Ves. 105; *Stilwell v. Wilkins*, Jac. 280.

(*y*) *Hatton v. Haywood*, L. R. 9 Ch. 229; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Watkins*, 11 Ch. D. 691; 13 Ch. D. 252; *Ex parte Evans*, 13 Ch. D. 252; *Smith v. Cowell*, 6 Q. B. D. 75; *Fuggle v. Bland*, 11 Q. B. D. 711.

his own part. For the rule of such courts is not to displace a *bonâ fide* possessor from any of the just rights attached to his title, unless there be some equitable ground for interference (z).

§ 836. This principle may be easily illustrated in the common case of executors and administrators. They are by law entrusted with authority to collect and administer the assets of the deceased party; and courts of equity will not interfere with their management and administration of such assets upon slight grounds. Whenever, therefore, the appointment of a receiver is sought against an executor or administrator, it is necessary to establish by suitable proofs, that there is some positive loss, or danger of loss, of the funds; as, for instance, some waste or misapplication of the funds, or some apprehended danger from the bankruptcy, insolvency, or personal fraud, misconduct, or negligence of the executor or administrator (a). If there be a solvent executor, no appointment will be made (b). Mere poverty of the party will not, of itself, constitute a sufficient ground; but there must be other ingredients to justify the appointment (c).

§ 837. So, where there are several incumbrances on an estate, as the first incumbrancer is entitled to the possession of the estate and the receipt of the rents and profits, a court of equity will not deprive him of such possession and profits unless upon sufficient cause shown. But if the first incumbrancer is not in possession, and does not desire it; or if he has been paid off; or if he refuses to receive what is due to him; there a receiver may be appointed upon the application of a subsequent incumbrancer. But in all cases of this sort, where the court acts in favour of subsequent incumbrancers, it is cautious, in thus interfering, not to disturb any prior rights or equities; and therefore, before it acts finally, it will endeavour to ascertain the priorities and equities of all the incumbrancers; and then it will apply the funds, which are received, according to such priorities and equities, in case the incumbrancers entitled thereto shall make a seasonable application for the purpose (d).

§ 838. So, where the tenants of particular estates for life, or in tail, neglect to keep down the interest due upon incumbrances upon the estates, courts of equity will appoint a receiver to receive the rents and profits, in order to keep down the interest; for this is but a mere act of justice to the incumbrancers, and also to those who may be otherwise interested in the estates (e). But here, again, it is to be

(z) *Tyson v. Fairclough*, 2 Sim. & St. 142; *Carrow v. Ferrior*, L. R. 3 Ch. 719; *Foxwell v. Van Grutten*, [1897] 1 Ch. 64.

(a) *In re Johnson*, L. R. 1 Ch. 325; *In re Hopkins*, *Dowd v. Hawkin*, 19 Ch. D. 61.

(b) *Bowen v. Phillips*, [1897] 1 Ch. 174.

(c) *Anon.*, 12 Ves. 4; *Howard v. Papera*, 1 Madd. 142.

(d) *White v. Bishop of Peterborough*, 3 Swanst. 109; *Berney v. Sewell*, 1 J. & W. 647; *Wood v. Rowe*, 2 J. & W. 554; *Langton v. Langton*, 7 De G. M. & G. 30.

(e) *Giffard v. Hart*, 1 Sch. & Lefr. 407, note; *Bertie v. Lord Abingdon*, 3 Meriv. 560.

remembered, that the court will not force incumbrancers to receive their interest; and, therefore, if they would avail themselves of the privileges of receiving the interest, they must make a seasonable application for the purpose (f).

§ 839. But although courts of equity will not appoint a receiver, except upon special grounds, justifying such an interference in the nature of a bill *Quia timet*; yet there are cases in which it will interpose, and require money to be paid into court by a party who stands in the relation of a trustee to the property, without any ground being laid to show that there has been any abuse or any danger to the fund. Thus, in cases of bills brought by creditors, or legatees, or distributees, against executors or administrators, for a settlement of the estate, if the executors or administrators admit assets in their hands, and the court takes upon itself a settlement of the estate, it will direct the assets to be paid into court (g).

§ 840. The like doctrine has been applied to cases where an executor or administrator has lodged funds of the estate in the hands of a banker, avowedly as assets. In such cases, upon the application of a party in interest, as, for instance, of a creditor or a legatee, the banker will be directed to pay the money into court; for it is a rule in equity to follow trust-money whenever it may be found in the hands of any person who has not *primâ facie* a right to hold it, and to order him to bring it into court (h).

§ 841. The general rule, upon which courts of equity proceed in requiring money to be paid into court, is this, that the party, who is entitled to the fund, is also entitled to have it secured. And this rule is equally applicable to cases where the plaintiffs, seeking the payment, are solely entitled to the whole fund, and to cases where they have acquired such an interest in the whole fund, together with others, as entitles them, on their own behalf and the behalf of others, to have the sum secured in court. Now, this is precisely the case in what is commonly called a creditor's action for the administration of an estate (i).

§ 842. And courts of equity will, in cases of this sort, not only order money to be paid into court, but they will also direct that papers and writings in the hands of executors and administrators shall be deposited in court, for the benefit of those interested, unless there are other purposes which require that they should be retained in the hands of the executors or administrators (k).

(f) *Gresley v. Adderley*, 1 Swanst. 573; *Thomas v. Brigstocke*, 4 Russ. 64; *Flight v. Camac*, 25 L. J. Ch. 654.

(g) *Freeman v. Fairlie*, 3 Mer. 29; *Neville v. Matthewman*, [1894] 3 Ch. 345.

(h) See *Bowsher v. Watkins*, 1 Russ. & Myl. 277; *Gedge v. Trail*, 1 Russ. & Myl. 281, note; *Law v. Law*, 2 Coll. 41.

(i) *Ante*, § § 543, 544, 546.

(k) *Freeman v. Fairlie*, 3 Meriv. 29, 30.

§ 843. The preceding remarks are principally (but not exclusively) applicable to cases of equitable property, whether the right of enjoyment thereof be present, future, or contingent. In regard to legal property, it is obvious that, where the right of enjoyment is present, the legal remedies will be generally found sufficient for the protection and vindication of that right. But where the right of enjoyment is future or contingent, the party entitled is often without any adequate remedy at law for any injury which he may in the meantime sustain by the loss, destruction, or deterioration of the property in the hands of the party who is entitled to the present possession of it. Thus, for instance, if personal property should be given by a will to A. for life, and after his death to B., there is, as we have seen, at law, no remedy to secure the legacy to B., whether it be of specific chattels, or of a pecuniary nature (l).

§ 844. Indeed, by the ancient common law, there could in general be no future right of property, created in personal goods and chattels, to take place in expectancy; for they were considered to be of so transitory a nature, and so liable to be lost, destroyed, or otherwise impaired, that future interests in them were not, in the law, treated as of any account (m). One exception was permitted, at an early period, as to goods and chattels given by will in remainder, after a bequest for life. But that was at first allowed only where the use of the goods or chattels, and not the goods or chattels themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the testator (n). That distinction has since been disregarded; and the limitation in remainder is now equally respected, whether the first legatee takes the use, or the goods and chattels themselves for life (o).

(l) *Ante*, § 603; 1 Eq. Abr. 360, pl. 4.

(m) 2 Black. Comm. 398; 1 Eq. Abr. 360, pl. 4; Fearné on Conting. Rem. by Butler (7th edit.), pp. 401 to 407, 413, 414.

(n) 2 Black. Comm. 398; *Hyde v. Parrat*, 1 P. Will. 1, and cases there cited; *Tissen v. Tissen*, 1 P. Will. 502.

(o) 2 Black. Comm.; Anon., 2 Freem. 145, 206; *Hyde v. Parrat*, 1 P. Will. 1, 6; *Upwell v. Halsey*, 1 P. Will. 651; *Vachel v. Vachel*, 1 Ch. Cas. 129, 130; *Foley v. Burnell*, 1 Bro. C. C. 274, 278; Co. Litt. 20 (a), Harg. note (5); Fearné on Conting. Rem. and Exec. Dev. (7th edit.), by Butler, pp. 401 to 407. This subject is discussed very much at large in Mr. Fearné's Essay on Contingent Remainders and Executory Devises, from pp. 401 to 407 (7th edit.), by Butler. There is in the same work a very valuable discussion upon the rights of the tenant for life in the goods and chattels, and how far the same may be taken in execution by his creditors. The result of the whole discussion seems to be, that the creditors cannot subject the property to their claims beyond the rights of the tenant for life therein. Mr. Fearné seems to consider that the validity of the executory dispositions of personal chattels (*i.e.*, in remainder after a life estate) was originally founded, and still rests, on the doctrine and interposition of courts of equity. But he admits, that in chattels real the right is recognized at law. Fearné on Conting. Rem. pp. 412, 413 (7th ed.); *Matthew Manning's Case*, 8 Co. 95; *Lampet's Case*, 10 Co. 47; *post*, § 847, note; Bac. Abr. Uses and Trusts, G. 2, p. 109 (Gwillim's edit.); *Wright v. Cartwright*, 1 Burr. 282. See *In re Smith's Will*, 20 Beav. 197.

§ 845. In all cases of this sort, where there is a future right of enjoyment of personal property, courts of equity will now interpose and grant relief upon a bill *Quia timet*, where there is any danger of loss or deterioration, or injury to it, in the hands of the party who is entitled to the present possession. We have already had occasion to take notice of the manner in which this remedial jurisdiction is applied in cases of legacies, whether pecuniary or specific, and whether vested or contingent (*p*). The same doctrine is applied to cases of annuities, charged on the personal estate (*q*).

§ 846. The same remedial justice will be applied to other cases, as well as to legacies and personal annuities. Thus, for instance, where a future interest in personal property is assigned by the owner to his creditors, the latter may come into a court of equity to have the property secured to their future use (*r*). On one occasion of this sort, Lord Hardwicke said, that nothing was better settled than that, “ whenever a demand was made out of assets certainly due, but payable at a future time, the person entitled thereto might come against the executor to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue those assets through several hands.” Nor is there any ground for the distinction taken between a legacy and a demand by contract (*s*).

§ 847. Upon the same ground, where, under marriage articles, the plaintiff, in case she survived her husband, had a contingent interest in certain South Sea Annuities, and a certain promissory note, which was specifically appointed for the payment of the same, to be allowed her, and the defendant had threatened to aliene the property and securities, on a bill *Quia timet*, a decree was made, that the defendant should give security to have the same forthcoming (*t*).

§ 848. So, where a party, seised of lands in fee, grants a rent-charge in fee, issuing thereout, and afterwards devises the lands to A. for life, with remainder to B. in fee, B. may maintain a bill *Quia timet*, to compel A. to pay the arrears during his life, for fear that otherwise the whole would fall on his reversionary estate (*u*). And the like principle would apply, under like circumstances, to a legacy, payable *in futuro*, and chargeable on land, to compel the tenant for life to pay or secure a proportion of the legacy (*x*).

§ 849. Another case of the application of the remedial justice of courts of equity by a bill of *Quia timet* is in cases of sureties of debtors

(*p*) *Ante*, § 603, 604; Fearn on Conting. Rem. p. 413 (7th edit.), by Butler; *id.* p. 414.

(*q*) *Batten v. Earnley*, 2 P. Will. 163; *Slanning v. Style*, 3 P. Will. 336, 337.

(*r*) *Johnson v. Mills*, 1 Ves. Sen. 282, 283.

(*s*) *Ibid.*

(*t*) *Flight v. Cook*, 2 Ves. Sen. 619. This doctrine is discussed at large in Eq. Abr. 360, pl. 4. See also Fearn on Cont. Rem. pp. 401 to 415 by Butler; Bac. Abr. Uses and Trusts, G. 2; and *ante*, § § 843, 844.

(*u*) *Hayes v. Hayes*, 1 Ch. Cas. 223.

(*x*) *Ibid.*

and others. We have already seen, that if a surety, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may bring an action of this sort to compel the debtor to discharge the debt or other obligation, for which the surety is responsible (*y*). Nay, it has been insisted (as we have also seen) that the surety may come into equity, and compel the creditor to sue the principal, and collect the debt from him in discharge of the surety, at least, if the latter will undertake to indemnify the creditor for the risk, delay, and expense of the suit.

§ 851. There are other cases, where a remedial justice is applied in the nature of bills *Quia timet*, as where courts of equity interpose to prevent the waste, or destruction, or deterioration of property, *pendente lite*, or to prevent irreparable mischief. But these cases will more properly come under review in our subsequent inquiries in matters of injunction.

(*y*) *Ante*, § § 327, 330, 639, 722, 729.

CHAPTER XXI.

BILLS OF PEACE.

§ 852. WE come, in the next place, to the consideration of what are technically called BILLS OF PEACE (*a*). These bills sometimes bear a resemblance to bills *Quia timet* (*b*), which latter (as has been already stated) seem to have been founded upon analogy to certain proceedings at the common law, *Quia timet*. Bills *Quia timet*, however, are quite distinguishable from the former in several respects, and are always used as a preventive process, before a suit is actually instituted; whereas bills of peace, although sometimes brought before any suit is instituted to try a right, are most generally brought after the right has been tried at law. It is not my design, in this place, to enter upon the subject of the cases generally, in which courts of equity will decree a perpetual injunction; for that will more properly be examined under another head; (*c*) but simply to treat of bills seeking an injunction, and strictly falling under the denomination of bills of peace.

§ 853. By a bill of peace we are to understand a bill brought by a person to establish and perpetuate a right which he claims, and which, from its nature, may be controverted by different persons, at different times, and by different actions; or, where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in the right, if it is already sufficiently established; or if it should be sufficiently established under the direction of the court. The obvious design of such a bill is to procure repose from perpetual litigation, and, therefore, it is justly called a bill of peace. The general doctrine of public policy, which, in some form or other, may be found in the jurisprudence of every civilized country, is, that an end ought to be put to litigation, and, above all, to fruitless litigation: *Interest reipublicæ ut sit finis litium*. If suits might be perpetually brought to litigate the same questions between the same parties, or their privies, as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for the termination of one suit would only become the signal for the institution of a new one; and the expenses might

(*a*) Co. Litt. 100 (*a*). Since the Judicature Act it would be called an action in the nature of a bill of peace, and could be brought either in the Chancery Division or in the Queen's Bench Division of the High Court.

(*b*) *Ante*, § 825.

(*c*) *Post*, §§ 873 to 958.

become ruinous to all the parties. The obvious ground of the jurisdiction of courts of equity, in cases of this sort, is to suppress useless litigation, and to prevent multiplicity of suits.

§ 854. One class of cases, to which this remedial process properly applied was, where there was one general right to be established against a great number of persons. And it might be resorted to, either where one person claims or defends a right against many, or where many claim or defend a right against one (*d*). In such cases, courts of equity interposed in order to prevent multiplicity of suits (*e*); for, as each separate party might sue, or might be sued, in a separate action at law, and each suit would only decide the particular right in question between the plaintiff and defendant in that action, litigation might become interminable. Courts of equity, therefore, having a power to bring all the parties before them, would at once proceed to the ascertainment of the general right; and, if it be necessary, they would ascertain it by an action or issue at law, and then make a decree finally binding upon all the parties (*f*).

§ 855. Bills of this nature may be brought by a lord against tenants for an encroachment under colour of a common right; or by tenants against the lord for disturbance of a common right; by a party in interest to establish a toll due by a custom; by a like party to establish the right to profits of a fair, there being several claimants; by a lord to establish an inclosure, which he has approved under the statute of Merton, and which his tenants throw down, although sufficient common of pasture is left (*g*).

§ 856. So, where a party has possession, and claims a right of fishery for a considerable distance on the river, and the riparian proprietors set up several adverse rights; he may have a bill of peace against all of them to establish his right, and quiet his possession (*h*). So, a bill of peace will lie to settle the amount of a general fine to be paid by all the copyhold tenants of a manor. So, it will lie to establish a right of common of the freehold tenants of a manor (*i*). So, it will

(*d*) *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8; *Phillips v. Hudson*, L. R. 2 Ch. 243.

(*e*) *Elme Hospital v. Andover*, 1 Vern. 266; *Hanson v. Gardiner*, 7 Ves. 309, 310; *Ware v. Horwood*, 14 Ves. 32, 33; *Dilley v. Doig*, 2 Ves. Jun. 486; *Cooper*, Eq. Pl. Introd. p. xxxiv.

(*f*) *Lord Tenham v. Herbert*, 2 Atk. 483, 484. Under Rolt's Act (25 & 26 Vict. c. 42), courts of equity were given power to determine the right themselves.

(*g*) *How v. Tenants of Bromsgrove*, 1 Vern. 22; *Elme Hospital v. Andover*, 1 Vern. 266; *Pawlet v. Ingres*, 1 Vern. 308; *Brown v. Vermuden*, 1 Ch. Cas. 272; *Rudge v. Hopkins*, 2 Eq. Abr. p. 170, pl. 27; *Conyers v. Abergavenny*, 1 Atk. 284, 285; *Poor v. Clark*, 2 Atk. 515; *Weekes v. Slake*, 2 Vern. 301; *Arthington v. Fawkes*, 2 Vern. 356; *Corporation of Carlisle v. Wilson*, 13 Ves. 279, 280; *Hanson v. Gardiner*, 7 Ves. 305, 309, 310; *Duka of Norfolk v. Myers*, 4 Mad. 50, 117.

(*h*) *Mayor of York v. Pilkington*, 1 Atk. 282; *Tenham v. Herbert*, 2 Atk. 483. See *New River Company v. Greaves*, 2 Vern. 431, 432.

(*i*) *Middleton v. Jackson*, 1 Ch. 18 (33); *Popham v. Lancaster*, 1 Ch. 96; *Cowper v. Clerk*, 3 P. Will. 157; *Powell v. Powis*, 1 Y. & Jer. 159.

lie to establish a duty, claimed by a municipal corporation against many persons, although there is no privity between them (*k*).

§ 857. But to entitle a party to maintain a bill of peace, it must be clear that there is a right claimed, which affects many persons, and that a suitable number of parties in interest are brought before the court; for, if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed; for it cannot then conclude any persons but the very defendants (*l*).

§ 858. It seems, too, that courts of equity will not, upon a bill of this nature, decree a perpetual injunction for the establishment or the enjoyment of a right of a party, who claims in contradiction to a public right; as if he claims an exclusive right to a highway, or to a common navigable river, or an exclusive right to a rope-ferry across a river; for it is said, that this would be to enjoin all the people of the state or country (*m*). But the true principle is, that courts of equity will not, in such cases, upon principles of public policy, intercept the assertion of public rights.

§ 859. Another class of cases to which bills of peace were ordinarily applied, is, where the plaintiff had, after repeated and satisfactory trials, established his right at law; and yet was in danger of further litigation and obstruction to his right from new attempts to controvert it. Under such circumstances, courts of equity would interfere, and grant a perpetual injunction to quiet the possession of the plaintiff, and to suppress future litigation of the right (*n*). This exercise of jurisdiction was formerly much questioned. Lord Cowper, in a celebrated case, where the title to land had been five several times tried in an ejectment, and five verdicts given in favour of the plaintiff, refused to sustain the jurisdiction for a perpetual injunction; and said that the application was new, and did not fall under the general notion of a bill of peace, and this was only a suit between A. and B., and one man is able to contend against another. But his decision was overruled by the House of Lords, and a perpetual injunction was decreed, upon the ground that it was the only adequate means of suppressing oppressive litigation and irreparable mischief (*o*). And this doctrine has ever since been steadily adhered to. However, courts of equity

(*k*) *City of London v. Perkins*, 4 Bro. Parl. C. 157, 1 Mad. Pr. Ch. 138, 139; *Mayor of York v. Pilkington*, 1 Atk. 284; *Lord Tenham v. Herbert*, 2 Atk. 483, 484.

(*l*) *Disney v. Robertson*, Bunb. 41; *Cowper v. Clerk*, 3 P. Will. 15; *Welby v. Duke of Rutland*, 3 Bro. Parl. C. 575; *Weller v. Smeaton*, 1 Bro. C. C. 572; *Baker v. Rogers*, 2 Eq. Abr. 171, pl. 2; *Select Cas. in Ch.* 74, 75.

(*m*) 1 Mad. Pr. Ch. 139; *Hilton v. Lord Scarborough*, 2 Eq. Abr. 171, pl. 2. But a ferryman, having an exclusive right of ferriage, may bring a bill of peace against those infringing his privilege. *Letton v. Gooden*, 2 Eq. 123.

(*n*) See Com. Dig. Chancery, D. 13; *Earl of Bath v. Sherwin*, Prec. Ch. 261; s.c. 10 Mod. 1.

(*o*) *Earl of Bath v. Sherwin*, Prec. Ch. 261; s.c. 10 Mod. 1; s.c. 2 Bro. Parl. C. 217; *Leighton v. Leighton*, 1 P. Will. 671, 672.

would not interfere in such cases before a trial at law; nor until the right had been satisfactorily established at law. But if the right were satisfactorily established, it was not material what number of trials had taken place, whether two only, or more (*p*).

§ 860. These seem to be the only classes of cases in which bills of peace, technically so called, will lie. But there are other cases bearing a close analogy to them, in which a like relief is granted; as, for instance, cases of confusion of boundaries, which, however, require some superinduced equity; and cases of quit-rents, where the remedy at law is either lost or deficient. Cases of mines and collieries may also be mentioned, where courts of equity will entertain bills in the nature of bills *Quia timet*, and bills of peace, where there is danger that the mine may be ruined in the meantime, before the right can be established; and upon such a bill the court will grant an adequate remedy by quieting the party in enjoyment of his right, by restoring things to their old condition, and by establishing the right by a decree (*q*). Other cases, also, where the object of the bill is to prevent vexatious suits, will occur under the head of Injunctions (*r*).

(*p*) *Devonsher v. Newenham*, 2 Sch. & Lefr. 208, 209; *Leighton v. Leighton*, 1 P. Will. 671, 672; *Lord Tenham v. Herbert*, 2 Atk. 483; *Earl of Darlington v. Bowes*, 1 Eden 270, 271, 272; *Weller v. Smeaton*, 1 Cox 102; s.c. 1 Bro. Ch. C. 573.

(*q*) *Falmouth (Lord) v. Innys*, Mos. 87, 89; *post*, § 929. In *Bush v. Western*, Prec. Ch. 530, the plaintiff had been in possession of a watercourse upwards of sixty years, and the defendant claimed the land through which the watercourse ran, under a foreclosed mortgage. The defendant obstructed the watercourse, and the plaintiff brought a bill for an injunction to quiet his, the plaintiff's, possession, and it was held maintainable, notwithstanding there was a remedy at law, and the title had not been established at law.

(*r*) *Post*, § § 925 to 930.

CHAPTER XXII.

INJUNCTIONS.

§ 861. THE last subject which is proposed to be treated under the second head of concurrent equity jurisdiction; namely, where the peculiar remedies, afforded by courts of equity, formerly constituted the principal although not the sole ground of jurisdiction, is that of INJUNCTIONS. A writ of injunction is now abolished and is replaced by a judgment or order which enjoins a party to do a particular thing, or to refrain from doing a particular thing (*a*). The most common form of a writ of injunction was that which operated as a restraint upon the party in the exercise of his real or supposed rights; and was sometimes called the remedial writ of injunction. The other form, commanding an act to be done, was sometimes called the judicial writ, because it issued after a decree, and was in the nature of an execution to enforce the same; as, for instance, it might contain a direction to the party defendant to yield up, or to quiet, or to continue, the possession of the land, or other property, which constituted the subject-matter of the decree in favour of the other party.

§ 862. The object of this process, which was most extensively used in equity proceedings, was generally preventive and protective, rather than restorative; although it was by no means confined to the former. It sought to prevent a meditated wrong more often than to redress an injury already done. It was not confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applied to cases belonging to its exclusive and to its auxiliary jurisdiction. It is treated of, however, in this place, principally, because it formed a broad foundation for the exercise of concurrent jurisdiction in equity. In cases, calling for such redress, there was always a prayer in the bill for this process and relief; and hence, bills of this sort were commonly called injunction bills.

§ 863. Indeed, unless an injunction were specifically prayed for by the bill, it was the settled practice not to grant this remedial process; because (it has been said) the defendant might make a different case by his answer against the general words of the bill, from what he would have done against the specific prayer for an injunction. This,

(*a*) Rules of the Supreme Court, 1883, O. 50, r. 11. See Eden, *Injunctions*; Kerr, *Injunctions*.

at least, constituted an exception from the general doctrine, as to the efficacy of the prayer for general relief (b). The Supreme Court in all its branches has now jurisdiction to grant an injunction in all cases in which it shall appear to the court to be "just or convenient," by force of section 25, sub-section 8 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and the general effect of this section (shortly stated) is to leave the old practice of the court of Chancery respecting the granting or withholding of an injunction untouched (c).

§ 864. The writ of injunction was peculiar to courts of equity, although there were some cases where courts of law exercised analogous powers; such as by the writ of prohibition and *estrepement* in cases of waste (d). The cases, however, to which these legal processes were applicable were so few, and so utterly inadequate for the purposes of justice, that the processes themselves fell into disuse; and almost all the remedial justice of this sort was administered through the instrumentality of courts of equity. The jurisdiction in these courts, then, had its true origin in the fact, that there was either no remedy at all at law, or the remedy was imperfect and inadequate. The jurisdiction was for a long time most pertinaciously resisted by the courts of common law, especially when it was applied by an injunction to stay suits and judgments in these courts. But it was firmly established in the reign of King James I. upon an express appeal to that monarch.

§ 865. It has been justly remarked by an eminent civilian, that injunctions, issued by the courts of equity in England, partook of the nature of interdicts according to the Roman law (e). The term interdict was used in the Roman law in three distinct, but cognate senses. It was, in the first place, often used to signify the edicts made by the prætor declaratory of his intention to give the remedy in certain cases, chiefly to preserve or to restore possession. And hence such an interdict was called edictal: "Edictale, quod prætoris edictis proponitur, ut sciant omnes eâ formâ posse implorari." Again, it was used to signify his order or decree, applying the remedy in the given case before him; and then it was called decretal: "Decretale, quod prætor pro rē natâ implorantibus decrevit." And in the last place it was used to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself.

(b) *Savory v. Dyer*, Ambler 60; *Cooke v. Martyn*, 2 Atk. 3; *Grimes v. French*, 2 Atk. 141; *Dormer v. Fortescue*, 3 Atk. 131; *Manaton v. Molesworth*, 1 Eden 26; 2 Mad. Pr. Ch. 173.

(c) James, L. J., *Day v. Brownrigg*, 10 Ch. D. at p. 307; Cotton, L. J., *North London Ry. v. G. N. Ry.*, 11 Q. B. D. at p. 39; A. L. Smith, L. J., *Kitts v. Moore*, [1895] 1 Q. B. 264.

(d) In the case of *Jefferson v. The Bishop of Durham*, 1 Bos. & Pul. 105, 120 to 132, the subject of these remedies in courts of law, in cases of waste, is very learnedly discussed.

(e) Halifax, Roman Civil Law, ch. 6, p. 102.

§ 866. It is in the second sense above stated, that the interdict of the Roman law bears a resemblance to the injunction of courts of equity. It is said to have been called interdict because it was originally interposed in the nature of an interlocutory decree between two parties contending for possession, until the property could be tried. But afterwards the appellation was extended to final decretal orders of the same nature. In the Institutes, interdicts are thus defined: Interdicts were certain forms of words, by which the prætor either commanded or prohibited something to be done; and they were chiefly used in controversies respecting possession or *quasi* possession. “*Erant autem interdicta formæ atque conceptiones verborum, quibus prætor aut jubebat aliquid fieri aut fieri prohibebat. Quod tunc Maxime fiebat, cum de possessione aut quasi possessione, inter aliquos contendebatur.*” (f). They were divided into three sorts, prohibitory, restitutory, and exhibitory interdicts. Prohibitory were those by which the prætor forbade something to be done, as when he forbade force to be used against a lawful possessor; restitutory, by which he directed something to be restored, as when he commanded possession to be restored to any one, who had been ejected from the possession by force; exhibitory, by which he ordered a person or thing to be produced (g). After this definition or description of the various sorts of interdicts, the Institutes proceed to state that some persons nevertheless have supposed that those only can be properly called interdicts which were prohibitory; because to interdict is properly to denounce and prohibit; and that the restitutory and exhibitory interdicts should properly be called decrees. But that by usage they are all called interdicts, because they are pronounced between two persons. “*Sunt tamen qui putent, propriè interdicta ea vocari, quæ prohibitoria sunt, quia interdicere sit denuntiare et prohibere; Restitutoria autem et exhibitoria, propriè decreta vocari. Sed tamen obtinuit, omnia interdicta appellari, quia inter duos dicuntur*” (h).

§ 867. Another division of interdicts in the Roman law was into those which were (1) to gain or acquire possession; or (2) to retain possession; or (3) to recover possession (i). And again, another division was into those which were (1) single, in which each of the litigant parties sustained one character, that of plaintiff or *actor*, or defendant or *reus*; or (2) double, in which each of the litigant parties sustained two characters, that of plaintiff or *actor*, and that of defendant or *reus* (k).

§ 868. From this summary account of the Roman interdicts, which were, after a time, superseded by what were called extraordinary

(f) Inst. Lib. 4, tit. 15, Introductio.

(g) *Ibid.* § 1; Halifax on Civil Law, ch. 6, p. 101; Dig. Lib. 43, tit. 1, ff. 1, 2.

(h) Inst. Lib. 4, tit. 15, § 1.

(i) *Ibid.* § § 2, 3, 4.

(k) *Ibid.* § 7.

actions, in which judgment was pronounced without any antecedent interdict, and in the same manner as if a beneficial action had been given in consequence of an interdict (l), it is easy to perceive that they partake very much of the nature of injunctions in courts of equity, and were applied to the same general purposes; that is to say, to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions, and to secure the permanent enjoyment of the rights of property.

§ 869. In the early course of chancery proceedings, injunctions to quiet the possession of the parties before the hearing were indiscriminately granted to either party, plaintiff or defendant, in cases where corporeal hereditaments were the subject of the suit; the object of them being to prevent a forcible change of possession by either party pending the litigation (m). These injunctions bore a very close resemblance to the interdict, *Uti possidetis*, of the Roman law, which was granted to either party in a suit, who was then in possession, in order that he might be secured therein as the legal possessor during the litigation. “Hoc interdictum (*Uti possidetis*) de soli possessore scriptum est, quem potiorum prætor in soli possessione habebat; et est prohibitorium ad retinendam possessionem (n). Est igitur hoc interdictum, quod vulgò *Uti possidetis* appellatur, retinendæ possessionis; nam hujus rei causâ redditur, ne vis fiat, ei, qui possidet (o). Hoc interdictum duplex est; et hi, quibus competit, et actores et rei sunt” (p).

§ 870. The interdict, *Unde vi*, in the Roman law, was granted to restore a possession forcibly taken away; whereas, the interdict, *Uti possidetis*, was granted to preserve a present possession. “*Illud (interdictum unde vi)*,” says the Digest, “enim restituit vi amissam possessionem; hoc (*interdictum uti possidetis*) tuetur, ne amittatur possessio. Denique prætor possidenti vim fieri vetat; et illud quidem interdictum oppugnat possessorem; hoc tuetur” (q).

§ 871. It is obviously incompatible with the object of these Commentaries to enumerate in detail (even if such a task were practicable) the various cases in which a writ of injunction was formerly granted by the courts of equity. Many cases of this sort have already been incidentally taken notice of in the preceding pages; and others again will occur hereafter. What is proposed to be done in this place is, to

(l) *Ibid.* § 8.

(m) 2 Collect. Jurid. 196; Beames, Ord. ch. 15, and note (49). One of Lord Bacon's Ordinances (26) is, that “Injunctions for possession are not to be granted before a decree; but where the possession hath continued by the space of three years before the bill exhibited; and upon the same title, and not upon any title by leave, or otherwise determined.” Beames, Ord. ch. 15.

(n) Dig. Lib. 43, tit. 17, f. 1, § 1.

(o) *Ibid.* f. 1, § 4.

(p) *Ibid.* f. 3, § 1. Proceedings analogous to those in the Roman law are recognised in the Scottish jurisprudence. Ersk. Inst. p. 764, § 47.

(q) Dig. Lib. 43, tit. 17, f. 1, § 4.

enumerate some only of the more common cases, in which it is applied, rather as illustrations of the nature and extent of the jurisdiction, than as a complete analysis of it.

§ 872. A learned writer enumerated, among the most ordinary objects of the remedial writ of injunctions, the following: "To restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, or from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying or having any intercourse, which the court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation." But he immediately adds: "These, however, are far from being all the instances. in which this species of equitable interposition is obtained. It would, indeed, be difficult to enumerate them all; for in the endless variety of cases, in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction" (r).

§ 873. The illustrations of the jurisdiction which will be attempted in our pages, will be principally limited to cases of injunctions to restrain the alienation of property; to restrain waste; to restrain nuisances; to restrain trespasses; and to prevent other irreparable mischiefs. We shall then add some few instances of special injunctions in order more fully to develop the nature and extent of this most beneficial process of preventive and remedial justice. "Injunctions are either interlocutory or perpetual. Interlocutory injunctions are such as are to continue until the hearing of the cause upon its merits or generally until further order. Perpetual injunctions are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience. The perpetual injunction is in effect a decree, and concludes a right. The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to preserve the property in dispute *in statu quo* until the hearing or further order.

(r) Eden on Injunct. ch. 1, pp. 1, 2. See also 1 Mad. Ch. Pr. 106.

In interfering by interlocutory injunction, the court does not, in general, profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that, till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime *in statu quo*. A man who comes to the court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of" (s).

§ 873a. When the learned author wrote, and for many years thereafter, the Court of Chancery restrained proceedings pending in common law and other courts by means of an injunction. As regards the institution of proceedings, it has been held that the Chancery Division still has jurisdiction to restrain a party from so acting (t). But it is now enacted by the Judicature Act, 1873, s. 24, sub-s. 5 of which provided:—No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally, or on any terms or conditions, may be relied on by way of defence thereto; Provided always, that nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally or so far as may be necessary for the purposes of justice; and the court shall thereupon make such order as shall be just (u). And by other provisions of the same section matters may be raised, by way of defence or substantive application, so that the general policy of the act may be effected, and all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

§ 899. It has sometimes been made a question whether courts of equity have authority to stay proceedings in the courts of foreign

(s) Kerr on Injunctions, 3rd edit. pp. 9, 10.

(t) *Besant v. Wood*, 12 Ch. D. 605.

(u) See *Wright v. Redgrave*, 11 Ch. D. 24.

countries. Nothing can be clearer than the proposition that the courts of one country cannot exercise any control or superintending authority over those of another country. The independence, equality, and sovereignty of every country would repudiate any such interference as inconsistent with its own supremacy within its own territorial domains. But although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no farther in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. Hence, the jurisdiction of courts of equity to relieve, in cases of contracts and other matters, respecting lands situated in foreign countries (x). But although the jurisdiction may exist, it is only exercised with the greatest caution and under such limitations as to render it practically non-existent (y). Jurisdiction is only exercised where there is some personal equity as fraud (z), or a money claim as in the case of waste (a), or an equitable right as in the case of a mortgage (b). Generally speaking the pendency of proceedings before a foreign tribunal is a reason for staying proceedings in this, unless the relief obtainable in each forum is not identical (c).

§ 905. In the next place, let us proceed to the consideration of the granting of injunctions to restrain the alienation of property in the largest sense of the words. The propriety of this sort of relief will at once be seen, by considering a very few cases, in which it is indispensable to secure the enjoyment of a specific property; or to preserve the title to such property; or to prevent frauds or gross and irremediable injustice in respect to such property.

§ 906. In regard to negotiable securities, if transferred to a *bonâ fide* holder without notice, the latter would be entitled to recover upon them, notwithstanding any fraud in their original concoction, or the loss

(x) *Penn v. Lord Baltimore*, 1 Ves. Sen. 444.

(y) *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416; *In re Hawthorne, Graham v. Massey*, 23 Ch. D. 743; *Eastern Concessions, Ltd. v. Black Point Syndicate*, 79 L. T. 658; *Deschamps v. Miller*, [1908] 1 Ch. 856. For a history of the establishment of the jurisdiction see *Lord Portarlington v. Soulby*, 3 M. & K. 104.

(z) *Lord Portarlington v. Soulby*, 3 M. & K. 104.

(a) *Carteret v. Petty*, 2 Swanst. 323 n.

(b) *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; reversed on other grounds [1912] A. C. 52.

(c) *Ostell v. Le Page*, 2 De G. M. & G. 892; *Noriss v. Chambers*, 3 De G. F. & J. 246; *Hyman v. Helm*, 24 Ch. D. 531.

of them by the real owner, it is therefore often indispensable to the security of the party, against whose rights they may be thus made available, to obtain an injunction prohibiting any such transfer (*d*).

§ 907. The same principle is applied to restrain the transfer of stocks. Thus, for instance, where there is a controversy respecting the title to stock under different wills, an injunction will be granted to restrain any transfer *pendente lite* (*e*). So, an injunction will be granted where the title to stock is controverted between principal and agent (*f*); or where a trustee or agent attempts to transfer it for his own benefit, and to the injury of the party beneficially entitled to it (*g*). So, also, to restrain the payment of money, where it is injurious to the party to whom it belongs; or where it is in violation of the trust to which it should be devoted (*h*). So, too, to restrain the transfer of diamonds or other valuables, where the rightful owner may be in danger of losing them (*i*).

§ 908. In like manner an injunction will be granted to restrain a party from making vexatious alienations of real property, *pendente lite* (*k*). So, also, to restrain a vendor from conveying the legal title of real estate pending an action for the specific performance of a contract for the sale of that estate (*l*). For, in every such case, the plaintiff may be put to the expense of making the vendee a party to the proceedings; and, at all events, his title, if he prevails in the action, may be embarrassed by such new outstanding title under the transfer (*m*). Although the maxim is, *Pendente lite nil innovetur*, that maxim is not to be understood as warranting the conclusion, that the conveyance so made is absolutely null and void at all times, and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that action; and they are not bound to take notice of the title acquired under it; but with regard to them the title is to be taken as if it had never existed. Otherwise, actions would be indeterminable, if one party, pending the suit, could, by conveying to others, create the necessity for introducing new parties (*n*).

§ 909. In the next place, let us proceed to the consideration of injunctions in the cases of waste (*o*). The state of the common law with regard to waste was very learnedly expounded by Lord Chief

(*d*) *Hood v. Aston*, 1 Russ. 412.

(*e*) *King v. King*, 6 Ves. 172.

(*f*) *Chedworth v. Edwards*, 8 Ves. 46.

(*g*) *Stead v. Clay*, 1 Sim. 294; 4 Russ. 550; *Rogers v. Rogers*, 1 Anst. 174.

(*h*) *Reeve v. Parkins*, 2 Jac. & Walk. 390; *Green v. Lowes*, 3 Bro. C. C. 217;

Pearce v. Piper, 17 Ves. 1.

(*i*) *Ximènes v. Franco*, 1 Dick. 149; *Tonnins v. Prout*, 1 Dick. 387.

(*k*) *Daly v. Kelly*, 4 Dow 440; *ante*, § 406; *post*, § 953.

(*l*) *Echcliff v. Baldwin*, 16 Ves. 267; *London and County Bank v. Lewis*, 21 Ch.

D. 460.

(*m*) *Echcliff v. Baldwin*, 16 Ves. 267.

(*n*) *Ante*, § § 405, 406; *Bellamy v. Sabine*, 1 De G. & J. 566.

(*o*) See Com. Dig. Chancery, 11 D. 4 X. *

Justice Eyre, in a celebrated case (p); and it can be best stated in his own words. "At common law" (said he) "the proceeding in waste was by writ of prohibition from the Court of Chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed, the ends of justice were answered. But, if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment, which was, and is, the foundation of all proceedings in prohibition, and of many other proceedings in this court at this day, &c. That writ being returnable in a court of common law, and most usually in the Court of Common Pleas, on the defendant appearing, the plaintiff counted against him; he pleaded; the question was tried; and, if the defendant was found guilty, the plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said (and truly so, I think, so far as can be collected from the text-writers) that at the common law, this proceeding lay only against tenant in dower, tenant by the curtesy, and guardian in chivalry; it was extended, by different statutes (stat. of Marlbridge, c. 24; stat. of Gloucester, c. 5), to farmers, tenants for life, and tenants for years, and, I believe, to guardians in socage (q). That which these statutes gave by way of remedy was not so properly the introduction of a new law as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first Act which introduced anything substantially new was that (stat. of Gloucester, c. 13) which gave a writ or waste or *estrepement*, pending the suit. It follows, of course, that this was a judicial writ, and was to issue out of the courts of common law. But, except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text-writers that any prohibition could issue from those courts. By the statute of Westminster 2nd, the writ of prohibition is taken away, and the writ of summons is substituted in its place; and, although it is said by Lord Coke, when treating of prohibition at the common law, that 'it may be used at this day;' those words, if true at all, can only apply to that very ineffectual writ, directed to the sheriff, empowering him to take the *posse comitatus*, to prevent the commission of waste intended to be done. The writ, directed to the party, was certainly taken away by the statute. At least, as far as my researches go, no such writ has issued, even from chancery, in the common cases of waste by tenants

(p) *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 120.

(q) Mr. Reeves (*Hist. of the Law*, vol. 1, p. 186; vol. 2, pp. 73, 74, 148, note) seems to suppose that these statutes were but an affirmance of the common law. In this opinion he is opposed by Lord Coke and other great authorities.

in dower, tenants by the curtesy, and guardians in chivalry, tenants for life, &c. &c., since it was taken away by the statute of Westminster 2nd. Thus the common-law remedy stood, with the alteration above mentioned, and with the judicial writ of *estrepement pendente lite*'' (r).

§ 910. To this luminous exposition of the state of the common law, it may be added, that there was, by the common law, another remedy of a preventive nature in the writ of *estrepement*. This lay after a judgment obtained in a real action, before possession was delivered by the sheriff, to prevent the tenant from committing waste in the lands recovered (s). And the statute of Gloucester (6 Edw. 1, c. 5), which gave the writ of *estrepement pendente lite*, also directed (c. 5) that the tenant should forfeit the place wasted, and also treble damages (t).

§ 911. The remedy by writ of *estrepement* was applicable only to cases of real actions; and, when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of *estrepement* did not apply, courts of equity, acting upon the principle of preserving the property, *pendente lite*, supplied the defect, and interposed by way of injunction (u). Real actions are now abolished by statute.

§ 912. But courts of equity have, by no means, limited themselves to an interference in cases of this sort. They have, indeed, often interfered in restraining waste by persons having limited interests in property, on the mere ground of the common-law rights of the parties, and the difficulty of obtaining the immediate preservation of the property from destruction or irreparable injury, by the process of the common law. But they have also extended this salutary relief to cases where the remedies provided in the courts of common law could not be made to apply; and, where the titles of the parties were purely of an equitable nature; and, where the waste was, what was commonly, although with no great propriety of language, called equitable waste (x); meaning acts which were deemed waste only in courts of equity; and where, as we have already seen, no waste had been actually committed, but was only meditated or feared to be done by a bill *Quia timet* (y).

§ 913. In order to show the beneficial nature of the remedial interference of courts of equity in cases of waste, it may not be without use to suggest a few cases where it was indispensable for the purposes of justice, and there was either no remedy at all at law, or none which is adequate. In the first place, there were many cases where a person

(r) *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 120; *Harrow School v. Alderton*, 2 Bos. & P. 86.

(s) Com. Dig. *Waste*, A., B.; Fitz. Nat. Brev. 60; 3 Black. Comm. 225 to 227.

(t) Com. Dig. *Waste*, C. 1; id. Chancery, D. 11; 2 Inst. 299; 3 Black. Comm. 227 to 299.

(u) *Pultney v. Shelton*, 5 Ves. 261, note; 3 Black. Comm. 227.

(x) *Marquis of Downshire v. Lady Sandys*, 6 Ves. 109; *Chamberlain v. Dummer*, 1 Bro. C. C. 166; *post*, § 915.

(y) *Ante*, § § 825 to 846.

was punishable at law for committing waste, and yet a court of equity would enjoin him. As, where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained, by injunction, from committing waste; although, if he did commit waste, no action of waste would have lain against him at common law by the remainderman for life, for he has not the inheritance, or by the remainderman in fee, by reason of the interposed remainder for life (*z*). But for permissive waste, there is no remedy against a tenant for life either at law or in equity (*a*). So, a ground landlord may have an injunction to stay waste against an under-lessee (*b*). So, an injunction may be obtained against a tenant from year to year, after a notice to quit, to restrain him from removing the crops, manure, &c., according to the usual course of husbandry (*c*). So, it may be obtained against a lessee, to prevent him from making material alterations in a dwelling-house, to the damage of the inheritance, but not otherwise (*d*).

§ 914. In the next place, courts of equity will grant an injunction in cases where the aggrieved party has equitable rights only; and, indeed, it has been said, that these courts will grant it more strongly where there is a trust estate (*e*). Thus, for instance, in cases of mortgages, if the mortgagor in possession commits waste, or threatens to commit it, an injunction will be granted, if the security be deficient (*f*), and in the converse case would enjoin a mortgagee if his security were admittedly sufficient (*g*), yet there was no remedy at common law. So, where there is a contingent estate, or an executory devise over, dependent upon a legal estate, courts of equity will not permit waste to be done to the injury of such estate; more especially not, if it is an executory devise of a trust estate (*h*).

§ 915. In the next place, in regard to equitable waste, which may be defined to be such acts as at law would not be esteemed to be waste, under the circumstances of the case, but which, in the view of a court of equity, are so esteemed, from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. As, if there be a tenant for life without impeachment for waste, and he should pull down houses, or do other waste wantonly and maliciously, a court of equity would restrain him; for, it is said, a court of equity ought to moderate the exercise of such a

(*z*) *Garth v. Cotton*, 1 Dick. 183; s.c. 1 Ves. 555.

(*a*) *Powis v. Blagrove*, 4 De G. M. & G. 484; *In re Cartwright*, *Avis v. Newman*, 41 Ch. D. 532.

(*b*) *Farrant v. Lovell*, 3 Atk. 723; s.c. Ambler, 105.

(*c*) *Kimpton v. Eve*, 2 V. & B. 349; *Pratt v. Brett*, 2 Mad. 62.

(*d*) *Jones v. Chapple*, L. R. 2 Eq. 539; *Doherty v. Allman*, 3 App. Cas. 709.

(*e*) *Stansfield v. Habergham*, 10 Ves. 273; *Turner v. Wright*, 2 De G. F. & J. 234. See *Blake v. Peters*, 1 De G. J. & S. 345.

(*f*) *Humphreys v. Harrison*, 1 J. & W. 581; *King v. Smith*, 2 Hare, 239.

(*g*) See *Rowe v. Wood*, 2 J. & W. 553; *Millett v. Davy*, 31 Beav. 470.

(*h*) *Stansfield v. Habergham*, 10 Ves. 278.

power, and, *pro bono publico*, restrain extravagant humorous waste (*i*). Upon this ground, tenants for life without impeachment for waste, and tenants in tail, after possibility of issue extinct, have been restrained, not only from acts of waste to the destruction of the estate, but also from cutting down trees planted for the ornament or shelter of the premises (*k*), even if planted by the tenant for life himself (*l*). So, a tenant for life, without impeachment of waste, has been restrained from cutting timber where certain trustees had powers inconsistent with his right, and to which it was expressly made subject (*m*). In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.

§ 915a. By the 3rd paragraph of s. 25 of the Judicature Act, 1873, it is provided that an estate for life, without impeachment of waste, shall not confer, or be deemed to have conferred, upon the tenant for life, any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating the estate.

§ 916. Upon similar grounds, although courts of equity will not interfere by injunction to prevent waste in cases of tenants in common, or coparceners, or joint-tenants, because they have a right to enjoy the estate as they please; yet they will interfere in special cases; as, where the party committing the waste is insolvent; or, where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoyment of the estate (*n*).

§ 917. From this very brief view of some of the more important cases of equitable interference in cases of waste, the inadequacy of the remedy at common law, as well to prevent waste, as to give redress for waste already committed, was so unquestionable, that there is no wonder that the resort to the courts of law, in a great measure, fell into disuse. The action of waste was of rare occurrence in later times (*o*); an action on the case for waste being generally substituted in its place, whenever any remedy was sought at law. The remedy in equity was so much more easy, expeditious, and complete, that it was almost invariably resorted to. By such remedy, not only could future waste be prevented, but, as we have already seen, an account might be decreed, and compensation given for past waste (*p*).

(*i*) *Abraham v. Budd*, 2 Freem. Ch. 53; *Lord Barnard's Case*, Prec. Ch. 454; *Aston v. Aston*, 1 Ves. Sen. 265.

(*k*) *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107; *Att.-Gen. v. Duke of Marlborough*, 3 Mad. 498; *Newdigate v. Newdigate*, 1 Cl. & F. 601.

(*l*) *Coffin v. Coffin*, 1 Jac. 70.

(*m*) *Kekewich v. Marker*, 3 Mac. & G. 311.

(*n*) *Smallman v. Onions*, 3 Bro. C. C. 621; *Hole v. Thomas*, 7 Ves. 589; *Arthur v. Lamb*, 2 Dr. & Sm. 428; *Bailey v. Hobson*, L. R. 5 Ch. 180.

(*o*) *Harrow School v. Alderton*, 2 Bos. & Pul. 86; *Redfern v. Smith*, 1 Bing. 382; 2 Bing. 262.

(*p*) *Ante*, §§ 515 to 518.

§ 918. The interference of courts of equity in restraint of waste was originally confined to cases founded in privity of title; and for the plaintiff to state a case, in which the defendant pretended that the plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under an adverse right, was said to be, for the plaintiff to state himself out of court. But at present the courts have, by insensible degrees, enlarged the jurisdiction to reach cases of adverse claims and rights, not founded in privity; as, for instance, to cases of trespass, attended with irreparable mischief, which we shall have occasion hereafter to consider (*q*).

§ 919. The jurisdiction, then, of courts of equity, to interpose, by way of injunction, in cases of waste, may be referred to the broadest principles of social justice. It is exerted, where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject-matter. On the other hand, courts of equity will often interfere in cases where the tenant in possession is impeachable for waste, and direct timber to be felled, which is fit to be cut, if in danger of running into decay, and thus will secure the proceeds for the benefit of those who are entitled to it (*r*).

§ 920. In the next place, let us proceed to the consideration of the granting of injunctions in cases of nuisances. Nuisances may be of two sorts: (1) such as are injurious to the public at large, or to public rights; (2) such as are injurious to the rights and interests of private persons.

§ 921. In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth (*s*). The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. Purpresture, according to Lord Coke, signifies a close, or inclosure, that is, when one encroaches, or makes that several to himself which ought to be common to many (*t*). The term was, in the old law writers, applied to cases of encroachment, not only upon the King, but upon subjects. But, in its common acceptance, it is now understood to mean an encroachment upon the King, either upon part of his demesne lands, or upon rights and easements held by the Crown of the public, such as upon

(*q*) *Haigh v. Jaggar*, 2 Coll. 231; *Earl Talbot v. Scott*, 4 Kay & J. 96.

(*r*) *Peters v. Blake*, 6 L. J. Ch. 157; *Honywood v. Honywood*, L. R. 18 Eq. 306; *Seagrave v. Knight*, L. R. 2 Ch. 628.

(*s*) Eden on Injunct. ch. 11, pp. 224, 225.

(*t*) 2 Inst. 38, 272.

highways, public rivers, forts, streets, squares, bridges, quays, and other public accommodations (*u*).

922. In cases of purpresture, the remedy for the Crown is either by an information of intrusion at the common law, or by an information at the suit of the Attorney-General in equity. In the case of a judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appear to be a mere purpresture, without being at the same time a nuisance, the court may direct an inquiry to be made, whether it is most beneficial to the Crown, to abate the purpresture, or to suffer the erections to remain and be arrested (*x*). But if the purpresture be also a public nuisance, this cannot be done; for the Crown cannot sanction a public nuisance.

§ 923. In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction. The instances of the interposition of the court, however, are (it is said) rare, and principally confined to information seeking preventive relief. Thus, informations in equity have been maintained against a public nuisance by stopping a highway. Analogous to that there have been many cases on the equity side of the Court of Exchequer, the jurisdiction of which is now vested in the Supreme Court, of nuisance to harbours, which are a species of highway. If the soil belongs to the Crown, there is a species of remedy for the purpresture above mentioned for that. And a similar jurisdiction was exercised in the case of marine foreshores (*y*).

§ 924. The ground of this jurisdiction of courts of equity in cases of purpresture, as well as of public nuisances, undoubtedly is, their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation. In the first place, they can interpose (where the courts of law could not, until recent times) to restrain and prevent such nuisances, which are threatened or are in progress, as well as to abate those already existing. In the next place, by a perpetual injunction, the remedy is made complete through all future time; whereas, an information or indictment at the common law can only dispose of the present nuisance; and for future acts new prosecutions must be brought. In the next place, the remedial justice in equity may be prompt and immediate, before irreparable mischief is done; whereas, at law, till lately, nothing could be done, except after

(*u*) *Ibid.*; Hale in Harg. Law Tracts, ch. 8, pp. 74, 78; *Att.-Gen. v. Forbes*, 2 Myl. & Cr. 123; *Earl of Ripon v. Hobart*, 3 Myl. & K. 169, 179, 180, 181.

(*x*) Hale in Harg. 81; *Att.-Gen. v. Richards*, 2 Anst. 603.

(*y*) See *Att.-Gen. v. Richards*, 2 Anst. 603; *Att.-Gen. v. Parmeter*, 10 Price, 378; in *H. L. nom. Parmeter v. Gibbs*, 10 Price 412; *Att.-Gen. v. Emmerson*, [1891] A. C. 649.

a trial, and upon the award of judgment. In the next place, a court of equity will not only interfere upon the information of the Attorney-General, but also upon the application of private parties (*z*), directly affected by the nuisance; whereas, at law, in many cases the remedy is, or may be, solely through the instrumentality of the Attorney-General (*a*).

§ 925. In regard to private nuisances, the interference of the courts by injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. It is not every case, which will furnish a right of action against a party for a nuisance, which will justify the interposition of the courts to redress the injury or to remove the annoyance. But there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction (*b*). Thus, every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary, but if repetition be threatened, or if it is continued so long as to become a nuisance, an injunction may be granted, to restrain the person from repeating or continuing it (*c*). So, a mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief (*d*).

§ 926. On the other hand, where the injury is irreparable, as where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or erection; in every such case courts of equity will interfere by injunction, in furtherance of justice and the violated rights of the party (*e*). Thus, for example, where a party builds so near the house of another party as to darken his windows, against the clear rights of the latter by prescription, courts of equity will interfere by injunction to prevent the nuisance being committed, but will not generally interfere after the building is completed, although an action for damages

(*z*) See *Soltau v. De Held*, 2 Sim. N. S. 133.

(*a*) See the observations of Lord Cattenham, L.C., in *Att.-Gen. v. Forbes*, 2 Myl. & Cr. 123.

(*b*) *Swaine v. G. N. Ry.*, 4 De G. J. & S. 211; *Salvin v. N. Brancepeth Coal Co.*, L. R. 9 Ch. 705; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Ruchmer v. Polsue & Alfieri, Ltd.*, [1906] 1 Ch. 234.

(*c*) *Coulson v. White*, 3 Atk. 21; *Gaunt v. Fynney*, L. R. 8 Ch. 8; *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142.

(*d*) *Att.-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304; *Att.-Gen. v. Cambridge Gas Consumers Co.*, L. R. 4 Ch. 71; *Colls v. Home and Colonial Stores*, [1904] A. C. 179.

(*e*) *Imperial Gas Light and Coke Co. v. Broadbent*, 7 H. L. C. 600; *Metropolitan Asylums Board v. Hill*, 6 App. Cas. 193; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Wood v. Conway Corporation*, [1914] 2 Ch. 47.

would lie at law; for the latter can in no just sense be deemed an adequate relief in such a case (*f*). The injury is material, and operates daily to destroy or diminish the comfort and use of the neighbouring house; and the remedy by a multiplicity of actions, for the continuance of it, would furnish no substantial compensation.

§ 926*a*. It has been said on many occasions that there can be no prescriptive right to commit a nuisance, on the other hand the measure of what constitutes a nuisance has always been tested by the "ordinary notions of mankind." Acquiescence for a long period of time in suffering acts which amount to a nuisance without protest may well be accepted as conclusive evidence that the subject matter of complaint is not an unreasonable exercise of individual freedom according to the "ordinary notions of mankind." And although this reason has not been given in any judicial exposition of the law, it has probably influenced the refusal of relief even in cases of information at the suit of the attorney-general (*g*).

§ 927. Cases of a nature calling for the like remedial interposition of courts of equity are—The obstruction or pollution of watercourses (*h*), the diversion of stream from mills, the back flowage on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation or adjacent mills to destruction (*i*). So, where easements or servitudes are annexed by grant or covenant, or otherwise, to private estates; or where privileges of a public nature, and yet beneficial to private estates, are secured to the proprietors contiguous to public squares or other places dedicated to public uses, the due enjoyment of them will be protected against encroachments by injunction. So, an injunction will be granted against a corporation to prevent an abuse of the powers granted to them to the injury of other persons (*k*). So, an injunction will be granted against the erection of a new ferry injurious to an old-established ferry (*l*). So, to restrain the ringing of bells by a Roman Catholic community, although the same was done only on Sundays (*m*). So, to prevent a tenant from removing mineral and other deposits from the bed of a stream running through a farm which he occupies (*n*). Other illustrations are afforded by the right of

(*f*) *Colls v. Home and Colonial Stores*, [1904] A. C. 179; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Higgins v. Betts*, [1905] 2 Ch. 210.

(*g*) *Att.-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304.

(*h*) *Att.-Gen. v. Terry*, L. R. 9 Ch. 423; *Ballard v. Tomlinson*, 29 Ch. D. 194; *Jones v. Llandaff Urban Council*, [1911] 1 Ch. 393. The pollution of streams is also dealt with by the Public Health Act, 1875, and the Rivers Pollution Act, 1876.

(*i*) *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Lane v. Newdigate*, 10 Ves. 194; see *Mazej Drainage Board v. G. N. Ry.*, 106 L. T. 429.

(*k*) *Coates v. Clarence Railway Company*, Russ. & Myl. 181.

(*l*) *Cory v. Yarmouth and Norwich Ry.*, 3 Hare, 593; *Hammerton v. Earl of Dysart*, [1915] A. C. 57.

(*m*) *Soltau v. De Held*, 2 Sim. N. S. 133.

(*n*) *Thomas v. Jones*, 1 Y. & Coll. Ch. 510.

support (o), and ancient lights (p), if the damage is serious and permanent.

§ 928. It is upon similar grounds that courts of equity interfered before the Judicature Act, 1873, in cases of trespass—that is to say, to prevent irreparable mischief, or to suppress multiplicity of suits and oppressive litigation. For, if the trespass were fugitive and temporary, and adequate compensation could be obtained in an action at law, there was no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But, later did so, if the acts done, or threatened to be done, to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity had not interfered in cases of this sort, there would (as has been truly said) be a great failure of justice in the country (q). But by the Judicature Act, 1873, s. 25, sub-s. 8, it is provided that if an injunction is asked either before, or at, or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both, or by either of the parties, are legal or equitable (r).

§ 930. It is upon similar principles, to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, that courts of equity interfere in cases of patents for inventions, and in cases of copyrights, to secure the rights of the inventor, or author, and his assigns and representatives. It is wholly beside the purpose of the present Commentaries to enter upon the subject of the general rights of inventors and authors, or to state the circumstances under which an exclusive property, in virtue of those rights, may be acquired or lost. Our observations will rather be limited to the consideration of the cases in which courts of equity will interfere to protect those rights, when acquired, by granting injunctions.

§ 931. It is quite plain, that, if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.

(o) *Hunt v. Peake*, Johns, 705; *Howley Park Coal and Council Co. v. L. & N. W. Ry.*, [1911] A. C. 11.

(p) *Tapling v. Jones*, 11 H. L. C. 290; *Colls v. Home and Colonial Stores*, [1904] A. C. 179; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Higgins v. Betts*, [1905] 2 Ch. 210.

(q) *Thomas v. Oakley*, 18 Ves. 184; *Haigh v. Jaggard*, 2 Coll. 231; *Earl Talbot v. Scott*, 1 K. & J. 96; *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142.

(r) *Stannard v. Vestry of St. Giles, Camberwell*, 20 Ch. D. 190; *Foxwell v. Van Grutten*, [1897] 1 Ch. 64.

§ 932. Indeed, in cases of this nature, it is almost impossible to know the extent of the injury done to the party without a discovery from the party guilty of the infringement of the patent or copyright; and if it were otherwise, mere damages would give no adequate relief. For example, in the case of a copyright, the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book, which he might otherwise have sold; but it may also be injuring him, to an incalculable extent, in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain (*s*).

§ 933. In addition to this consideration, the plaintiff could at law have no preventive remedy, which should restrain the future use of his invention, or the future publication of his work, injuriously to his title and interest. And it is this preventive remedy which constitutes the peculiar feature of equity jurisprudence, and enables it to accomplish the great purposes of justice. Besides, in most cases of this sort, the bill usually seeks an account, in one case of the books printed, and, in the other, of the profits which have arisen from the use of the invention, from the persons who have pirated the same. And this account will, in all cases where the right is established, be decreed as incidental, in addition to the other relief by a perpetual injunction (*t*).

§ 934. In cases, however, where a patent had been granted for an invention, it was not a matter of course for courts of equity to interpose by way of injunction. If the patent had been but recently granted, and its validity had not been ascertained by a trial at law, the court would not formerly act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction; but it would require it to be ascertained by a trial in a court of law, if the defendant denied its validity, or put the matter in doubt. But, if the patent had been granted for some length of time; and the patentee had put the invention into public use; and had had an exclusive possession of it under his patent for a period of time, which might fairly create the just presumption of an exclusive right, the court would, in such a case, ordinarily interfere by way of preliminary injunction, pending the proceedings; reserving, of course, unto the ultimate decision of the cause, its own final judgment on the merits. But since the Judicature Act, 1873, the validity or invalidity of the patent is determined in the court which grants or refuses the injunction (*u*).

§ 935. Similar principles apply to cases of copyright (*x*). But it does not seem indispensable to relief in either cases, that the party

(*s*) *Hogg v. Kirby*, 8 Ves. 215 at pp. 224, 225; *Wilkins v. Aiken*, 17 Ves. 424.

(*t*) *Colburn v. Sims*, 2 Hare 543; *Lever v. Goodwin*, 36 Ch. D. 1. There is a statutory jurisdiction to order the delivery up of pirated copies.

(*u*) *Halsey v. Brotherhood*, 15 Ch. D. 514.

(*x*) *Wilkins v. Aiken*, 17 Ves. 424.

should have a strictly legal title. It is sufficient that under the patent or copyright, the party has a clear equitable title (*y*).

§ 936. There are some peculiar principles, applicable to cases of copyright, which deserve notice in this place, and are not generally applicable to patents for inventions. In the first place, no copyright can exist, consistently with principles of public policy, in any work of a clearly irreligious, immoral, libellous, or obscene description. In the case of an asserted piracy of any such work, if it be a matter of any real doubt, whether it falls within such a predicament or not, courts of equity will not interfere by injunction to prevent or to restrain the piracy; but will leave the party to his remedy at law (*z*).

§ 937. It is true, that an objection has been taken to this course of proceeding, that by refusing to interfere in such cases to suppress the publication, a court of equity virtually promotes the circulation of offensive and mischievous books. But the objection vanishes, when it is considered that the court does not affect to act as a *censor morum*, or to punish or restrain injuries to society generally. It simply withholds its aid from those who, upon their own showing, have no title to protection, or to assert a property in things which the law will not, upon motives of the highest concern, permit to be deemed incapable of founding a just title or property (*a*).

§ 938. The soundness of this generous principle can hardly admit of a question. The chief embarrassment and difficulty lie in the application of it to particular cases. If a court of equity, under colour of its general authority, is to enter upon all the moral, theological, metaphysical, and political inquiries, which, in past times, have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions; and if it is to decide dogmatically upon the character and bearing of such discussions, and the rights of authors, growing out of them; it is obvious, that an absolute power is conferred over the subject of literary property, which may sap the very

(*y*) *Mawman v. Tegg*, 2 Russ. 385.

(*z*) I am not unaware that Lord Eldon has held the opposite of this doctrine; and that is, that if it does admit of real doubt, whether the work be irreligious, immoral, libellous, or seditious, or not, an injunction ought to be denied, upon the mere ground of the doubt. It has been thought that there is great difficulty in adopting this doctrine, denying the protection of an injunction in matters of property upon mere doubts. *Prima facie* the copyright confers title; and the *onus* is on the other side to show clearly that, notwithstanding the copyright, there is an intrinsic defect in the title. See *Lawrence v. Smith*, Jac. 472.

(*a*) *Walcot v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Meriv. 435; *Lawrence v. Smith*, Jac. 471, 474, note. But Mr. Kerr, in his work on Injunctions, 3rd edit. p. 497, is of opinion that these cases would not be followed at the present day. As the learned author remarks, "The right of an author in his manuscript before publication is an absolute and exclusive one, and cannot be affected by the nature of the contents. The nature and character of the work are fit considerations for the court, in determining whether it ought to be protected after publication under the statutory law of copyright, but should not be gone into where a man is illegally deprived of an absolute and exclusive right of property."

foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical as well as metaphysical truths. Thus, for example, a judge, who should happen to believe that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided), would deem any work anti-Christian which should profess to deny that point, and would refuse an injunction to protect it. So, a judge, who should be a Trinitarian, might most conscientiously decide against granting an injunction in favour of an author enforcing Unitarian views; when another judge, of opposite opinions, might not hesitate to grant it (*b*).

§ 939. In the next place, in cases of copyright, difficulties often arise, in ascertaining whether there has been an actual infringement thereof, which are not strictly applicable to cases of patents. For instance, in dealing with the same topic, authors must reproduce the same ideas, and frequently in identical language (*c*), or independent labours may end in the production of identical maps, or designs (*d*). So, of translations (*e*). It is, for instance, clearly settled not to be any infringement of the copyright of a book, to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it; or to make a *bonâ fide* use of the same common materials in the composition of another work (*f*). And a work, consisting partly of compilations and selections from former works, and partly of original compositions, may be the subject of copyright (*g*). But what constitutes a *bonâ fide* case of extracts, or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials, is often a matter of most embarrassing inquiry. The true question, in all cases of this sort, is (it has been said), whether there has been a legitimate use of the copyright publication, in the fair exercise of a mental operation, deserving the character of a new work. If there has been, although it may be prejudicial to the original author, it is not an invasion of his legal rights. If there has not been, then it is treated as a mere colourable curtailment of the original work, and a fraudulent evasion of the copyright (*h*). But this is another mode of stating the difficulty, rather than a test affording a clear criterion to discriminate between the cases (*i*). Pirating the wood engravings

(*b*) *Lawrence v. Smith*, Jac. 471; *Bowman v. Secular Society, Ltd.*, [1917] A. C. 406.

(*c*) *Jarrold v. Houldston*, 3 K. & J. 708; *Pike v. Nicholas*, L. R. 5 Ch. 251.

(*d*) *Wilkins v. Aikin*, 17 Ves. 422.

(*e*) *Wyatt v. Barnard*, 3 Ves. & B. 77; *Chatterton v. Cave*, 3 App. Cas. 483.

(*f*) *Campbell v. Scott*, 11 Sim. 31. But in *Tinsley v. Lacy*, 1 H. & M. 747, Lord Hatherley said the cases as to abridgment had gone far enough, and expressed his disapproval of several of the *dicta* on the subject. See Kerr on Injunctions, 3rd edit. pp. 366, 367.

(*g*) *Lewis v. Fullarton*, 2 Beav. 6.

(*h*) *Kelly v. Morris*, L. R. 1 Eq. 697; *Pike v. Nicholas*, L. R. 5 Ch. 251.

(*i*) See *Campbell v. Scott*, 11 Sim. 31; *Bramwell v. Halcomb*, 3 Myl. & Cr. 737; *Lewis v. Fullarton*, 2 Beav. 6.

printed in a book as illustrations of the stories therein, and using them in a book as illustrations of different stories, is an infringement of a copyright, which may be restrained by injunction (*k*). It has been held that a prose translation of a copyright prose romance, having no qualities of a paraphrase, is not an infringement of the author's copyright of the original, although the author had procured the work to be translated into the same language as the alleged infringement, and in that language also copyrighted (*l*). A person writing words to an old air, and procuring an accompaniment and preface, and publishing the whole together, is entitled to a copyright in the whole (*m*).

§ 940. A difficulty of a similar character often arises, in the ascertainment of the fact whether a work is original or not. Of some intellectual productions, the originality admits of as little doubt as the originality of some inventions or discoveries. But, in a great variety of cases, the differences between the known and the unknown, between the new and the old, between the original and the copy, depend upon shades of distinction extremely minute and almost inappreciable. It is obvious that there can be no monopoly of thoughts, or of the expression of them. Language is common to all; and in the present advanced state of literature, and learning, and science, most species of literary works must contain much which is old and well known, mixed up with something which perhaps is new, peculiar, and original. The character of some works of this sort may, beyond question, be in the highest sense original; such, for example, as the works of Shakespeare, and Milton, and Pope, and Sir Walter Scott; although all of them have freely used the thoughts of others. Of others, again, the original ingredients may be so small and scattered, that the substance of the volumes may be said to embrace little more than the labour of sedulous transcription, and colourable curtailment of other works. There are others of an intermediate class, where the intermixture of original and borrowed materials may be seen in proportions more nearly approaching to an equality with each other. And there are others, again, as in cases of maps, charts, translations, and road-books, where, the materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials. The difficulty here is, to distinguish what belongs to the exclusive labours of a single mind from what are the common sources of the materials of the knowledge used by all. Suppose, for instance, the case of maps: one man may publish the map of a country: another man, with the same design, if he has equal skill and opportunity, may by his own labour produce almost a *facsimile*. He has certainly a right so to do. But then from his right through that medium, it does not follow that he would be at liberty

(*k*) *Bogue v. Houlston*, 5 De G. & Sm. 267; *Bradbury v. Hotten*, 8 Ex. 1. And, photographing is within the prohibition. *Gambart v. Ball*, 14 C. B. N. S. 306.

(*l*) *Murray v. Bogue*, 1 Drew. 353.

(*m*) *Leader v. Purday*, 17 C. B. 97; *Wood v. Boosey*, 3 Q. B. 223.

to copy the other map, and claim it as his own. He may work on the same original materials; but he cannot exclusively and evasively use those already collected and embodied by the skill, industry, and expenditures of another (*n*).

§ 941. In some cases of this nature a court of equity will take upon itself the task of inspection and comparison of books alleged to be a piracy (*o*); or the matter may be referred to an expert (*p*) or to the master, who then reports whether the books differ, and in what respects; and, upon such a report, the court usually acts in making its interlocutory, as well as its final decree (*q*).

§ 942. In cases of the invasion of a copyright by using the same materials in another work, of which a large proportion is original, it constitutes no objection that an injunction will in effect stop the sale and circulation of the work which so infringes upon the copyright. If the parts which are original cannot be separated from those which are not original, without destroying the use and value of the original matter, he who has made the improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to another, and the mixture is forbidden by the law, he must again separate them, and bear all the mischief and loss which the separation may occasion. The same rule applies to the use of literary matter (*r*). It proceeds upon the same general principle of justice which applies to the ordinary case of a confusion of property by premeditation or wanton impropriety (*s*).

§ 943. We may now proceed to the consideration of other cases where, upon similar grounds of irreparable mischief, or the inadequacy of the remedy at law, or the prevention of multiplicity of suits, courts of equity interfere by way of injunction. And here, we may take notice, in the first place, of a class of cases bearing a close analogy to that of copyrights; that is to say, cases where courts of equity interfere to restrain the publication of unpublished manuscripts. In cases of literary, scientific, and professional treatises in manuscripts, it is obvious that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a

(*n*) *Wilkins v. Aiken*, 17 Ves. 424, 425; *Longman v. Winchester*, 16 Ves. 269, 271; *Matthewson v. Stockdale*, 12 Ves. 270; *Carey v. Faden*, 5 Ves. 24.

(*o*) *Bramwell v. Holcomb*, 3 M. & Cr. 737; *Lewis v. Fullarton*, 2 Beav. 6.

(*p*) *Gyles v. Wilcox*, 2 Atk. 141.

(*q*) *Carnan v. Bowles*, 2 Bro. C. C. 80; *Lane v. Leadbetter*, 4 Ves. 681.

(*r*) *Mawman v. Tegg*, 2 Russ. 112; *Chatterton v. Cave*, 3 App. Cas. 483; *Leslie v. Young*, [1894] A. C. 335.

(*s*) Story, Comm. on Bailment, § 40; *ante*, § § 468, 623.

general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them. The property, then, in such manuscripts, not having been parted with in cases of this sort, if any attempt is made to publish them without the consent of the author or proprietor, it is obvious that he ought to be entitled to protection in equity. And, accordingly, this course of granting injunctions against such unauthorized publications has been constantly acted upon in courts of equity, and has been applied to all sorts of literary compositions (*t*).

§ 944. Upon the same principle, the publication of private or confidential letters has been restrained where the publication has been attempted without the consent of the author (*u*). Upon one occasion of this sort the question arose whether letters having this character remained in any respect the property of the writer after they were transmitted to the person to whom they were addressed. It was held that they did; that by sending letters the writer does not part wholly with his property in the literary compositions, nor give the receiver the power of publishing them, and that at most the receiver has only a special property in them, and possibly may have the property of the paper. But this does not give a licence to any person whatsoever to publish them to the world, unless for the purpose of vindicating his character, and at most the receiver has only a joint property with the writer. Whether he is to be considered as having such joint property or not, letters must be treated as within the laws protecting the rights of literary property; and a violation of those rights in that instance is attended with the same legal consequences as in the case of an unpublished manuscript of an original composition of any other description (*x*).

§ 945. In *Gee v. Pritchard* (*y*), Lord Eldon explained the doctrine of courts of equity on this subject to be founded, not on any notion that the publication of letters would be painful to the feelings of the writer, but upon a civil right of property, which the court is bound to respect. That the property is qualified in some respects; that, by sending a letter, the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is addressed; yet, that the gift is so restrained, that, beyond the purposes for which the letter is sent, the property is in the sender. Under such circumstances, it is immaterial whether the intended publication is for the purpose of profit or not. If for profit, the party

(*t*) *Macklin v. Richardson*, Ambler 694; *Abernethy v. Hutchinson*, 3 L. J. C. G. Ch. 209; *Caird v. Sime*, 12 App. Cas. 326; *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441.

(*u*) *Pope v. Curl*, 2 Atk. 342. See *Philip v. Pennell*, [1907] 2 Ch. 577.

(*x*) *Lord Percival v. Phipps*, 2 Ves. & B. 19; *Earl of Lytton v. Devey*, 54 L. J. Ch. 293; *Lord Ashburton v. Pape*, [1913] 2 Ch. 469.

(*y*) 2 Swanst. 402.

is then selling; if not for profit, he is then giving that, a portion of which belongs to the writer.

§ 946. A question has been made, and a doubt has been suggested, how far the protection ought to be given, to restrain the publication of mere private letters on business or on family concerns, or on matters of personal friendship, and not strictly falling within the line of literary compositions (z).

§ 948. Fortunately for public as well as for private peace and morals, the learned doubts on this subject have been overruled; and it is now held, that there is no distinction between private letters of one nature and private letters of another. For the purposes of public justice, publicly administered, according to the established institutions of the country, in the ordinary modes of proceeding, private letters may be required to be produced and published. But it by no means follows, that private persons have a right to make such publications on other occasions, upon their own notion of taking the administration of justice into their own hands, or for the purpose of vindicating their own conduct, or of gratifying their own enmity, or of indulging a gross and diseased public curiosity, by the circulation of private anecdotes, or family secrets, or personal concerns (a).

§ 949. Principles of a similar nature have been applied for the assistance of persons, to whom letters are written, and by whom they are received, in order to protect such letters from publication in any manner injurious to the rights of property of the lawful owners thereof (b). So, they have been applied in all cases where the publication would be a violation of a trust or confidence, founded in contract (c), or implied from circumstances. Thus, for example, where a person delivers scientific or literary oral lectures, it is not competent for any person who is privileged to hear them, to publish the substance of them from his own notes (d); for the admission to hear such lectures is upon the implied confidence and contract, that the hearer will not use any means to injure or to take away the exclusive right of the lecturer in his own lectures (e). And one may be restrained by injunction from publishing the contents of documents, the knowledge of which he obtains from the production of the documents, as exhibits, or under the order of the court (f).

(z) *Perceval v. Phipps*, 2 Ves. & B. 24 to 28.

(a) *Gee v. Pritchard*, 2 Swanst. 402; *Philp v. Pennell*, [1907] 2 Ch. 577; *Lord Ashburton v. Pape*, [1913] 2 Ch. 469.

(b) *Earl of Granard v. Dunkin*, 1 Ball & Beat. 207; *Thompson v. Stanhope*, Ambler 737.

(c) See *Lord Perceval v. Phipps*, 2 Ves. & B. 19, 27.

(d) *Abernethy v. Hutchinson*, 3 L. J. O. S. Ch. 209; *Nichols v. Pitman*, 26 Ch. D. 374; *Caird v. Sime*, 12 App. Cas. 326.

(e) *Williams v. Prince of Wales Life Ins. Co.*, 23 Beav. 338; *Hopkinson v. Lord Burghley*, L. R. 2 Ch. 447.

(f) *Macklin v. Richardson*, Ambler, 694; *Morris v. Kelly*, 1 Jac. & W. 481.

§ 950. So, where a dramatic performance has been allowed by the author to be acted at a theatre, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theatre without the consent of the author or proprietor; for his permission to act it at a public theatre does not amount to an abandonment of his title to it, or to a dedication of it to the public at large.

§ 951. So, an injunction will be granted against publishing a magazine in a party's name who has ceased to authorize it (*g*); so, to restrain the directors of a joint-stock company from publishing a prospectus, which, without authority, stated A. to be a trustee of the company (*h*); or, from using the name of a newspaper, published by the plaintiff, for the fraudulent purpose of deceiving the public, by suggesting to the public that the plaintiff was in some way interested in the concern (*i*). So, an injunction will be granted against vending an article of trade under the assumed name of a party, or with false labels, to the injury of the same party, who has already acquired a reputation in trade by it (*k*). So, an injunction will be granted to restrain the owner from running omnibuses, having on them such names and words, and devices, as to form a colourable imitation of the words, names, and devices on the omnibuses of the plaintiff; for this has a natural tendency to deprive the plaintiff of the fair profits of his business, by attracting custom under the false representation that the omnibuses of the defendant belong to and are under the management of the plaintiff (*l*). So, an injunction will be granted to prevent the use of names, marks, letters, or other *indicia* of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman, when they are not so (*m*).

§ 951a. In applications for injunctions for using trade marks, the plaintiff must come into court, however, with clean hands. If he has himself been using false marks, or indulged in practices tending to deceive the public, relief may be refused in a court of equity (*n*).

§ 951b. And where one sells his share in a partnership business then in operation, it imports the sale of the goodwill of the business. This comprehends every positive advantage which has been acquired by the firm in carrying on its business, whether connected with the place or the name of the firm; but it does not imply a prohibition against the retiring partner carrying on the same business in the same place, so that he do it under such a name as not to give the impression that he

(*g*) *Hogg v. Kirby*, 8 Ves. 215.

(*h*) *Routh v. Webster*, 10 Beav. 561.

(*i*) *Walter v. Ashton*, [1902] 2 Ch. 282.

(*k*) *Croft v. Day*, 7 Beav. 84; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Turton v. Turton*, 42 Ch. D. 128.

(*l*) *Knott v. Morgan*, 2 Keen 213.

(*m*) *Wortherspoon v. Currie*, L. R. 5 H. L. 508; *Reddaway v. Banham*, [1896] A. C. 199.

(*n*) *Perry v. Truefitt*, 6 Beav. 66; *Newman v. Pinto*, 57 L. T. 31.

is the successor of the old firm (*o*). On the sale of the goodwill of a business the purchaser is entitled to use the vendor's name for ordinary business purposes (*p*), but only on condition that he does not, by so doing, expose the vendor to any liability (*q*); and if, on the sale of a business, the goodwill is not expressly assigned, there is no right on the part of the purchaser to use the firm name (*r*).

§ 951*c*. A leading case in regard to the extent of the jurisdiction of courts of equity, as to their remedial justice by way of injunction, is the *Emperor of Austria v. Day and Kossuth* (*s*); where it was held that the plaintiff, although not entitled to an injunction from a court of equity in England to stop any proceedings there, the object and tendency of which might be to abridge or destroy his prerogative rights and interests as a foreign sovereign with whom the government was on terms of amity, might maintain an action to restrain the defendant from manufacturing notes of an insurrectionary government, as it affected his proprietary rights in respect of the circulating medium. So a plaintiff resident abroad may obtain the assistance of English courts to restrain the defendant from acts calculated to lead people to believe that the goods of the defendant sold in England are those of the plaintiff (*t*). But there is no jurisdiction to restrain the defendant from committing a tort outside the jurisdiction of English courts (*u*).

§ 951*d*. Before the Judicature Acts it was held that the Court of Chancery had no power by injunction to restrain the publication of a libel, because its power was confined to cases where there was injury, either actual or prospective, to property (*x*), but under the extensive powers conferred by 36 & 37 Vict. c. 66, s. 25, sub-s. 8, which enacts, *inter alia*, that an injunction may be granted by an interlocutory order of the court, in all cases in which it shall appear to the court to be just or convenient that such order should be made, it is held that an injunction can now be granted to restrain the publication of libellous matter (*y*), or false representations calculated to injure the plaintiff's trade (*z*). This can be done even on an interlocutory application, but

(*o*) *Trego v. Hunt*, [1896] A. C. 7; *Burchell v. Wilde*, [1900] 1 Ch. 551; *Curl Brothers v. Webster*, [1904] 1 Ch. 685.

(*p*) *Levy v. Walker*, 10 Ch. D. 436.

(*q*) *Thynnes v. Shove*, 45 Ch. D. 577, 582.

(*r*) *Gray v. Smith*, 43 Ch. D. 208.

(*s*) 3 De G. F. & J. 217.

(*t*) *Collins Co. v. Brown*, 3 K. & J. 423; *Collins Co. v. Curwen*, 3 K. & J. 423; *Société Anonyme Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513.

(*u*) *Morocco Bound Syndicate v. Harris*, [1895] 1 Ch. 534; Cp. *Lecouturier v. Reg.*, [1910] A. C. 262.

(*x*) *Prudential Assurance Company v. Knott*, 10 Ch. 142.

(*y*) *Saxby v. Easterbrook*, 3 C. P. D. 339; *Hill v. Hart-Davies*, 21 Ch. D. 298; *Thomas v. Edwards*, 14 Ch. D. 284; *Liverpool Household Stores Association v. Smith*, 37 D. Ch. 170.

(*z*) *Thorley's Cattle Food Company v. Massam*, 6 Ch. D. 582; *Spalding v. Gamage* (No. 2), 84 L. J. Ch. 449.

the court should be slow to act. For, to justify the court in granting an interim injunction, it must come to a decision upon the question of libel or not libel before the jury have decided whether it is a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable (a). And an interlocutory injunction will never be granted unless there is some reason to suppose that injury will be done either to the person or the property of the plaintiff (b). So, on the same principle, the court has jurisdiction to restrain a person from making slanderous statements, calculated to injure the business of another person, even though such statements be made orally, and not by writing or printing (c); but in this case, also, the jurisdiction should be exercised with great care (d). But the court will not restrain, by an interim injunction, trade circulars honestly issued, even though calculated to damage the plaintiff's business, unless there is a very strong *prima facie* case on the evidence before the court that there is a violation of some contract entered into between the plaintiff and the defendant (e).

§ 952. Upon similar grounds of irreparable mischief, courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment. And it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests (f). Thus, a party has been restrained from using the secret of compounding a medicine not protected by patent, when it appeared that the secret was imparted to him, to his own knowledge, in breach of faith or contract, on the part of the person so communicating it (g).

§ 953. Before closing this subject, we shall now proceed to state a few other cases of special injunctions, in order more fully to illustrate the nature and limits of the jurisdiction, and the importance of it, to prevent a total failure of remedial justice. There are, for instance, many cases, in which courts of equity will interfere by injunction, to prevent the sale of real estates; as to restrain the vendor from selling to the prejudice of the vendee, pending an action for the specific performance of a contract respecting an estate; for it might put the latter

(a) *Quartz Hill Consolidated Gold Mining Company v. Beall*, 20 Ch. D. 501; *Bonnard v. Perryman*, [1891] 2 Ch. 269.

(b) *Salomons v. Knight*, [1891] 2 Ch. 294.

(c) *Hermann Loog v. Bean*, 26 Ch. D. 306; *Hayward v. Hayward*, 34 Ch. D. 198.

(d) *Hermann Loog v. Bean*, 26 Ch. D. 306; see p. 317.

(e) *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company*, 25 Ch. D. 1; *Tallerman v. Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1.

(f) *Cholmondeley v. Clinton*, 19 Ves. 261, 267; *Youatt v. Winyard*, 1 Jac. & Walk. 394; *Prince Albert v. Strange*, 1 Mac. & G. 25.

(g) *Morison v. Moat*, 9 Hare 255; *Amber Size and Chemical Co. v. Manzel*, [1913] 2 Ch. 239.

to the expense of making the purchaser a party, in order to give perfect security to his title (*h*). But if the contract is not clearly enforceable the jurisdiction will not be exercised (*i*).

§ 954. In like manner, sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons; as in cases of trusts and special authorities, where the party is abusing his trust or authority (*k*). And where sales have been made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, courts of equity will also restrain the purchaser from paying over the purchase-money (*l*). And, generally, where the necessity of the case requires it, a court of equity will interfere to prevent a defendant from affecting property in litigation, by contracts, conveyances, or other acts (*m*).

§ 955. Cases of injunctions against a transfer of stocks, of annuities, of ships, and of negotiable instruments, furnish an appropriate illustration of the same principle (*n*); as also do injunctions to restrain husbands from transferring property in fraud of the legal or equitable rights of their wives (*o*).

§ 955a. The question has been made, how far a court of equity has jurisdiction to interfere in cases of public functionaries, who are exercising special public trusts or functions. As to this, the established doctrine now is, that so long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority (*p*).

§ 956. We have already had occasion to take notice of the granting of injunctions in the cases of persons having future interests in chattels, as in remainder after an immediate estate for life (*q*). The same principle is applied to cases of personal property, bequeathed as heirlooms,

(*h*) *Echcliff v. Baldwin*, 16 Ves. 267; *Curtis v. Marquis of Buckingham*, 3 Ves. & B. 168; *Metropolitan Railway v. Woodhouse*, 34 L. J. Ch. 297. See *ante*, § 406, 908.

(*i*) *Hadley v. London Bank of Scotland*, 3 De G. J. & S. 63.

(*k*) *Anon.*, 6 Mad. 10; *Parrott v. Congreve*, 18 L. J. Ch. 279.

(*l*) *Green v. Lowes*, 3 Bro. C. C. 217; *Matthews v. Jones*, 2 Anst. 506.

(*m*) *Great Western Ry. v. Birmingham, &c., Ry.*, 2 Phil. 597; *Shrewsbury and Chester Ry. v. Shrewsbury and Birmingham Ry.*, 1 Sm. N. S. 410.

(*n*) *Lord Chedworth v. Edwards*, 8 Ves. 46; *Hood v. Aston*, 1 Russ. 412; *Stead v. Clay*, 1 Sim. 294; 4 Russ. 550; *ante*, § 907.

(*o*) *Flight v. Cook*, 2 Ves. Sen. 619; *Roberts v. Roberts*, 2 Cox 422.

(*p*) *Frewin v. Lewis*, 4 Myl. & Cr. 250.

(*q*) *Ante*, §§ 843, 844.

or settled in trust to go with particular estates. Thus, for example, household furniture, plate, pictures, statues, books, and libraries, are often bequeathed or settled in trust, to go with the title of certain family mansions and estates. In such cases, courts of equity will enforce a due observance of the trust, and restrain the parties having a present possession from wasting the property or doing any acts inconsistent with the trust (*r*).

§ 957. Injunctions will also be granted in urgent cases to restrain the sailing of a ship, upon the application of a part-owner whose share is unascertained, in order to ascertain that share, and to obtain the usual security, given in the admiralty, for the due return of the ship (*s*), or upon the application of the buyer, to enforce specific performance of a contract for the sale and purchase of a ship (*t*). So, they will be granted against the removal of timber, which has been wrongfully cut down (*u*).

§ 958. Injunctions will also be granted to compel the due observance of personal negative covenants (*x*). Thus, in the old case of the parish bell, where certain persons owning a house in the neighbourhood of a church entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning to their disturbance. The agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour (*y*). Upon the same ground a celebrated play-writer, who had covenanted not to write any dramatic performances for another theatre, was, by injunction, restrained from violating the covenant (*z*). So, an author, who had sold his copyright in a work, and covenanted not to publish any other to its prejudice, was restrained by injunction from so doing (*a*).

§ 958a. Notwithstanding some apparent vacillation in the decisions of the courts of equity, in regard to the propriety of enforcing the negative portion of a contract by injunction, where they cannot enforce the specific performance of the affirmative counter stipulations, which constitute the main basis of the contract, it seems now to be established that the court will interfere to prevent the violation of a negative stipulation in a contract under the circumstances mentioned; but it must now be considered as settled law, that in the absence of a

(*r*) *Ante*, §§ 843, 844, and note, § 845; *Cadogan v. Kennet*, Cowp. 435, 436; Co. Litt. 20 a, Hargrave's note (5).

(*s*) *Haley v. Goodson*, 2 Meriv. 77; *Christie v. Craig*, 2 Mer. 137. See *Castelli v. Cook*, 7 Hare, 89.

(*t*) *Hart v. Herwig*, L. R. 8 Ch. 860.

(*u*) *Anon.*, 1 Ves. Jun. 93.

(*x*) *Ante*, § 710, 718, 721, 722, 850.

(*y*) *Martin v. Nutkin*, 2 P. Will. 266.

(*z*) *Morris v. Colman*, 18 N. S. 437.

(*a*) *Barfield v. Nicholson*, 2 Sim. & Stu. 1; *Ingram v. Stiff*, 5 Jur. N. S. 947.

negative stipulation in an agreement for service, the remedy of injunction will not be available, whatever other remedies are open to a plaintiff (*b*).

§ 959. Courts of equity also used to interfere, and effectuate their own decrees in many cases by injunctions, in the nature of a judicial writ or execution for possession of the property in controversy; as, for example, by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance (*c*). Injunctions of this sort are older than the time of Lord Bacon, since, in his Ordinances, they are treated as a well-known process. Indeed, they have been distinctly traced back to the reign of Elizabeth and Edward the Sixth, and even of Henry the Eighth (*d*). In some respects they bore an analogy to sequestrations; but the latter process, at least since the reign of James the First, has been applied not merely to the lands in controversy in the cause, but also to other lands of the party (*e*). This form of injunction is now obsolete.

(*b*) *Lumley v. Wagner*, 1 De G. M. & G. 604; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

(*c*) *Penn v. Lord Baltimore*, 1 Ves. Sen. 454; *Dove v. Dove*, 1 Cox 101; s.c. 1 Bro. C. C. 373; 2 Dick. 617; *Huguenin v. Baseley*, 15 Ves. 180.

(*d*) Beam. Ord. Ch. 15, 16.

(*e*) *Ibid.* and note (*c*), p. 363; *id.* 16, and note 55; *Barton*, Suit in Eq. 87; 2 Mad. Pr. Ch. 163.

CHAPTER XXIII.

EXCLUSIVE JURISDICTION—TRUSTS.

§ 960. HAVING taken the general survey of equity jurisprudence in cases of concurrent jurisdiction, we shall, in the next place, proceed to the consideration of another head proposed in these Commentaries, that of EXCLUSIVE JURISDICTION. And this again, like the former head, is divisible into two branches: the one dependent upon the subject-matter, the other upon the nature of the remedy to be administered. The former comprehends TRUSTS, in the largest and most general sense of the word, whether they are express or implied, direct or constructive, created by the parties, or resulting by operation of law. The latter comprehends all those processes or remedies, which are peculiar and exclusive in courts of equity, and through the instrumentality of which they endeavour to reach the purposes of justice in a manner unknown or unattainable at law.

§ 961. And, in the first place, let us examine the nature and extent of the jurisdiction of courts of equity in matters of trust, which will be found directly or remotely to embrace most of the subjects of their exclusive jurisdiction. It has been well observed, that the principles of law, which guided the decisions of the courts of common law, were principally formed in times when the necessities of men were few, and their ingenuity was little exercised to supply their wants. Hence, it has happened, that there are many rights according to the principles of natural and universal justice, for injuries to which the law, as administered by those courts, has provided no remedy. This is particularly the case in matters of trust and confidence, of which the ordinary courts of law, in a vast variety of instances, take no cognizance. The positive law being silent on the subject, courts of equity, considering the conscience of the party intrusted, as bound to perform the trust, in order to prevent a total failure of justice, interfered to compel the performance of it. And, as they will compel the performance of the trust, so, on the other hand, they will assist the trustees, and protect them in the due performance of the trust, whenever they seek the aid and direction of the court as to the establishment, the management, or the execution of it.

§ 962. For the most part, indeed, matters of trust and confidence are exclusively cognizable in courts of equity; there being few cases, except bailments, and rights founded in contract, and formerly

remedial by an action of assumpsit, and especially by an action for money had and received, in which a remedy could ever have been given in the courts of law. Thus, for example, a debt, or *chose in action*, was not generally assignable, at law, except in cases of negotiable instruments. And, hence, the assignee was ordinarily compellable to seek redress against the assignor and the debtor solely in courts of equity.

§ 963. It is not within the design of these Commentaries to enter upon a minute examination of the nature and peculiarities of trusts, as known to English jurisprudence, or to attempt, by any development of the history of their rise and progress, to ascertain the exact boundaries of the jurisdiction at present exercised over them. In general, it may be said, that trusts constitute a very important and comprehensive branch of equity jurisprudence; and that, when the remedy in regard to them ends at law, then the exclusive jurisdiction in equity, for the most part, begins.

§ 964. A trust, in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof (a). In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favour of others; and these uses, benefits, or charges constitute the trusts which courts of equity will compel the legal owner, as trustee, to perform in favour of the *cestui que trust*, or beneficiary. Three things are said to be indispensable to constitute a valid trust: first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object (b).

§ 965. It is in the highest degree probable, that those trusts, which are exclusively cognizable in courts of equity, were, in their origin, derived from the Roman law, being very similar, in their nature, to the *fidei commissa* of that law. As the jurisdiction of a peculiar prætor was created for the express purpose of protecting property *fidei commissum*, so the jurisdiction of our courts of equity, if not created, was soon extended, for the purpose of protecting and enforcing the execution of trusts. Indeed, it is impossible to suppose, that in a country professing to have an enlightened jurisprudence, obligations and trusts in regard to property, binding in conscience and duty, and which, *ex æquo et bono*, the party ought to perform, should be left without any positive means of securing their due

(a) Lord Hardwicke, in *Sturt v. Mellish*, 2 Atk. 612, said: "A trust is, where there is such a confidence between parties, that no action at law will lie; but is merely a case for the consideration of this court."

(b) *Malim v. Keighley*, 2 Ves. J. 333, 529; *Cruwys v. Colman*, 9 Ves. 323.

fulfilment; or that they might be violated without rebuke, or evaded with impunity.

§ 966. In the Institutes of Justinian, a summary account is given of the origin and nature of the Roman *fidei commissa*. It is there observed, that anciently all trusts were unenforceable (precarious); for no man could, without his own consent, be compelled to perform what he was requested to do. But, when testators were unable directly to bequeath an inheritance or legacy to certain persons, if they did bequeath it to them, they gave it in trust to other persons, who were capable of taking it by will. And therefore such bequests were called trusts (*fidei commissa*), because they could not be enforced by law, but depended solely on the honour of those to whom they were intrusted. Afterwards, the Emperor Augustus, having been frequently solicited in favour of particular persons, either on account of the solemn adjurations of the party, or on account of the gross perfidy of other persons, commanded the consuls to interpose their authority. This, being a just and popular order, was by degrees converted into a permanent jurisdiction. So great, indeed, was the favour in which trusts were held, that at length a special prætor was created to pronounce judgment in cases of trusts; and hence he was called the Commissary of Trusts (*Fidei Commissarius*) (c).

§ 967. This brief sketch of the origin and nature of trusts in the civil law does, in a very striking manner, illustrate the origin and nature of trusts in the common law of England, in regard to real property. It has been well remarked by Mr. Justice Blackstone, that uses and trusts in English jurisprudence are, in their original, of a nature very similar, or rather exactly the same, answering more to the *fidei commissum* than to the *usus fructus* of the civil law; the latter being the temporary right of using a thing, without having the ultimate property or full dominion of the substance (d).

§ 968. Lord Coke, describing the nature of a use or trust in land according to the common law, uses the following language: A use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privy to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* (the beneficiary) shall take the profit, and that the term-tenant shall make an estate according to his direction. So, a *cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust for which he had no remedy by the common law; but for breach of trust his remedy was by subpoena in chancery (e). Thus, we see, that the original fiduciary estate, from its nature, imparted a right to the

(c) Inst. B. 2, tit. 23, § 1; 2 Black Comm. 327, 328; Bac. on Uses, 19.

(d) Black Comm. 327; Bac. on Uses, 19.

(e) Co. Litt. 272 b; *Chudleigh's Case*, 1 Co. 121, a, b; Bac. Abr. *Uses and Trusts*, A. B.

enjoyment of the profits of the land, as distinct from the seisin of the land, and the rights issuing thereout.

§ 969. The introduction of uses and trusts into England has been generally attributed to the ingenuity of the clergy, in order to escape from the prohibitions of the Mortmain Acts. But whether this be the true origin of them or not, it is very certain that the general convenience of them in subserving the common interests of society, as well as in enabling parties to escape from forfeitures in times of civil commotion, soon gave them an extensive public approbation, and secured their permanent adoption into the system of English jurisprudence (*f*). And they have since been applied to a great variety of cases, which never could have been in the contemplation of those who originally introduced them; but which, nevertheless, are the natural attendants upon a refined and cultivated state of society, where wealth is widely diffused, and the necessities and conveniences of families, of commerce, and even of the ordinary business of human life, require that trusts should be established, temporary or permanent, limited or general, to meet the changes of past times, as well as to provide for the exigencies of times to come (*g*).

§ 970. According to the spirit of over-nice and curious learning belonging to the age, uses in lands, upon their introduction into English jurisprudence, were refined upon with many elaborate distinctions, to cure the mischiefs arising from which the Statute of Uses of 27 Henry VIII. ch. 10, was enacted, the general intent of which was to transfer the use into possession, and to make the *cestui que use* complete owner of the lands, as well at law as in equity. But as the statute did not in its terms apply to all sorts of uses, and was construed not to apply to uses ingrafted on uses (which constitute one great class of modern trusts in lands), it failed in a great measure to accomplish the ends for which it was designed (*h*). Thus, for example, it was held not to apply to trusts or uses created upon term of years; or to trusts of a nature requiring the trustee still to hold out the estate, in order to perform the trusts; and, generally, not to trusts created in relation to mere personal property (*i*).

(*f*) 2 Black. Comm. 328, 329; Bac. Abr. *Uses and Trusts*, A. B.; Gilb. Lex Præt. 259, 260. See also *Lloyd v. Spillet*, 2 Atk. 149, 150; *Hopkins v. Hopkins*, 1 Atk. 591; *ante*, § 48.

(*g*) 2 Black. Comm. 330.

(*h*) 2 Black. Comm. 332, 333; Butler's note (281) to Co. Litt. 271 b.

(*i*) 2 Black. Comm. 335 to 337; Butler's note (1) to Co. Litt. 290 b, and to Co. Litt. 271 b, note (1), iii. § 5; Bac. Abr. *Uses and Trusts*, B., C., D., G., 2 H.; Bac. Abr. *Trusts*, A. It is said, that a tenant by the curtesy cannot stand seised to a use, for he is in by the act of law in consideration of marriage, and not in privity of estate; and for a like reason also tenant in dower, by the better opinion, cannot stand seised to a use. Sanders on Uses, ch. 1, § 11, pp. 62, 63. But in equity such a tenant would nevertheless be affected by the use or trust.

§ 971. In regard to uses, it seems formerly to have been a matter of considerable doubt, whether at the common law they could be raised by parol, or even by writing without a seal. Lord Chief Baron Gilbert has extracted a distinction from the different cases, which will in some measure reconcile their apparent contrariety. It is in effect that a use might be raised at the common law by parol upon any conveyance which operated by way of transmutation of possession, or passed the possession by some solemn act, such as a feoffment; since the estate itself might, by the common law, pass by a parol feoffment; and therefore, by the same reason, a use of the estate might be declared by parol. But where a deed was requisite to the passing of the estate itself, there a deed was also necessary for the declaration of the uses. Thus, for example, a man could not covenant to stand seised to use without a deed (*k*).

§ 972. However this may have been, the Statute of Frauds of 29 Charles II., ch. 3, s. 7, requires all declarations or creations of trusts or confidences of any lands, tenements, and hereditaments to be manifested and proved by some writing, signed by the party entitled to declare such trusts, or by his last will in writing; and section 8 of the statute excepts trusts "of lands or tenements" arising, resulting, transferred, or extinguished by operation of law, which obviously excludes declarations of trusts of personalty which may be declared verbally (*l*). Neither does it prescribe any particular form or solemnity in writing; nor that the writing should be under seal. Hence, any writing sufficiently evincive of a trust, as a letter, or other writing of a trustee, stating the trust, or any language in writing, clearly expressive of a trust, intended by the party, although in the form of a desire or a request, or a recommendation, will create a trust by implication (*m*). And where a trust is created for the benefit of a third person, although without his knowledge, he may afterwards affirm it, and enforce the execution of it in his own favour, at least, if it has not, in the intermediate time, been revoked by the person who has created the trust (*n*).

§ 973. Uses or trusts, to be raised by any covenant or agreement of a party in equity, must be founded upon some meritorious or some valuable consideration; for courts of equity will not enforce a mere gratuitous gift (*donum gratuitum*), or a mere moral obligation. Hence it is, that, if there be a mere voluntary executory trust created, courts of equity will not enforce it (*o*). And, upon the same ground, if two persons for a valuable consideration, as between themselves,

(*k*) Gilb. Uses, 270, 271.

(*l*) *Benbow v. Townsend*, 1 M. & K. 506; *McFadden v. Jenkins*, 1 Phil. 153; *Cochrane v. Moore*, 25 Q. B. D. 57.

(*m*) *Vandenbergh v. Palmer*, 4 K. & J. 204. See *Kekewich v. Manning*, 1 De G. M. & G. 176.

(*n*) *Acton v. Woodgate*, 2 Myl. & K. 492.

(*o*) *Jefferys v. Jefferys*, Cr. & Ph. 153.

covenant to do some act for the benefit of a third person, who is a mere stranger to the consideration, he cannot enforce the covenant against the two, although each one might enforce it against the other (*p*). But it is otherwise in cases where the use or trust is already created and vested, or otherwise fixed in the *cestui que trust*; or where it is raised by a last will and testament (*q*). Thus, for example, if A. should direct his debtor to hold the debt in trust for B., and the debtor should accept the trust, and communicate the fact to both A. and B., the trust, although voluntary, would be enforced in favour of B., and binding on A.; for nothing remains to be done to fix the trust. So, if A. had declared himself trustee for B. of the same debt, the same doctrine would apply (*r*).

§ 974. Trusts in real property, which are exclusively cognizable in equity, are now in many respects governed by the same rules as the like estates at law, and afford a striking illustration of the maxim *æquitas sequitur legem*. Thus, for example, they are descendible, devisable, and alienable; and heirs, devisees, and alienees may, and generally do, take therein the same interests in point of construction and duration, and they are affected by the same incidents, properties, and consequences, as would under like circumstances apply to similar estates at law (*s*). We say generally, because there are exceptions to the doctrine above stated. Thus, for example, the construction put upon executory trusts arising under agreements and wills, sometimes differs, in equity, from that in regard to executed trusts. And trusts in terms for years and personalty will be often recognized and enforced in equity, which would be wholly disregarded at law (*t*).

§ 975. In regard to trusts, the analogy to estates at the common law is not only followed, as to the rights and interests of the *cestui que trust*, but also as to the remedies to enforce, preserve, and extinguish those rights and interests. Thus, for instance, there cannot, strictly speaking, be a disseisin, abatement, or intrusion, as to a trust estate. But, nevertheless, there may be such an adverse claim of a

(*p*) *Sutton v. Viscount Chetwynd*, 3 Mer. 249; *Davenport v. Bishop*, 2 Y. & C. Ch. 451; 1 Ph. 698.

(*q*) *In re Curteis' Trusts*, L. R. 14 Eq. 217.

(*r*) *McFadden v. Jenkins*, 1 Phil. 152. See also *Stapleton v. Stapleton*, 14 Sim. 186.

(*s*) 2 Black. Comm. 337. The most remarkable deviation, in executed trusts, from the rules in relation to legal estates, is that a man may be tenant by the curtesy of a trust estate of his wife; but a woman was not, till the Dower Act, entitled to dower in a trust estate of her husband. Lord Redesdale, in *D'Arcy v. Blake*, 2 Sch. & Lefr. 387, has given the best account of the origin of this anomaly.

(*t*) *Austen v. Taylor*, Ambler 376; s.c. 1 Eden 361; *Massenburgh v. Ash*, 1 Vern. 234, 304. Hence, in executory trusts created by a will, the rule in *Shelley's Case*, 1 Co. 99 (as it is called), will not be strictly followed in equity; but the same construction will be had, as governs in regard to marriage articles, if the same intent is apparent on the face of the will. There is, however, a distinction between marriage articles and executory trusts arising under wills, as to the inference of the intention of the parties. It is stated *post*, § 984.

trust estate by an adverse claimant, taking the rents and profits, as may amount to an equitable ouster of the rightful claimant; and such as, if continued twelve years, would, by analogy to legal remedies, bar any assertion of his right in equity (*u*). We have already had occasion to consider this subject in reference to statutes of limitations generally (*x*). And it may be here added, that bars to relief in equity from lapse of time are also entertained in courts of equity, independently of the express provisions of any statute of limitations (*y*). By the Judicature Act, 1873, sect. 25, sub-sect. 2, it is provided that no claim of a *cestui que trust* against his trustees for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations. But a trustee may also claim the benefit of the Statute of Limitations except where the claim is founded upon fraud or fraudulent breach of trust to which he is party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee and converted to his use (*z*).

§ 976. It is a general rule in courts of equity, that wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person, in whom it is vested (not being a *bonâ fide* purchaser for a valuable consideration without notice, or otherwise entitled to protection), to execute the trust, or to transfer the property. For, it is a rule in equity, which admits of no exception, that a court of equity never wants a trustee (*a*). This is often applied to the cases of powers of sale of lands, given by will for the payment of debts and other purposes which are in the nature of a trust. In such cases, if the power becomes extinct at law, either from no person being appointed in the will to execute it, or from the party designated, dying before the execution of it, courts of equity will decree the execution of such trust, and compel the party in possession, as heir or devisee of the legal estate in the lands, to perform it (*b*). And, generally, it may be stated, that where the property has been bequeathed in trust, without the appointment of a trustee, if it is personal estate, the personal representative is deemed the trustee; and if real estate, the heir or devisee is deemed the trustee, and is bound to its due execution (*c*). And now, by the Conveyancing Act, 1881,

(*u*) *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1; *ibid.* 191, note.

(*x*) *Ante*, §§ 55, 529, 771; *post*, §§ 1520, 1521.

(*y*) *Ante*, § 55.

(*z*) Trustee Act, 1888, sect. 8. *In re Somerset, Somerset v. Earl Poulett*, [1894] 1 Ch. 231; *How v. Earl Winterton*, [1896] 2 Ch. 626.

(*a*) Co. Litt. 290 b. Butler's note (1); Co. Litt. 113 n, Butler's note (51); *ante*, § 98; *Dodkin v. Brunt*, L. R. 6 Eq. 580; *In re Birchall, Birchall v. Ashton*, 40 Ch. D. 436.

(*b*) Co. Litt. 113 a, Butler's note (1); *ibid.* 290, Butler's note (1).

(*c*) 1 Mad. Pr. Ch. 365; *Dilrow v. Bone*, 3 Giff. 538.

sect. 30, it is enacted that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, invested on any trust, or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time in like manner as if the same were a chattel real vesting in them or him; and, accordingly, all the like powers for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section, the personal representatives, for the time being of the deceased, shall be deemed in law his heirs and assigns within the meaning of all trusts and powers.

§ 977. The power of a trustee over the legal estate or property vested in him, properly speaking, exists only for the benefit of the *cestui que trust*. It is true, that he may as legal owner do acts to the prejudice of the rights of the *cestui que trust*, and he may even dispose of the estate or property, so as to bar the interests of the latter therein; as by a sale to a *bonâ fide* purchaser, for a valuable consideration without notice of the trust. But when the alienation is purely voluntary, or where the estate devolves upon the personal representative or personal representatives of the trustee, or where the alienee has notice of the trust, the trust attaches to the estate, in the same manner as it did in the hands of the trustee himself, and it will be enforced accordingly in equity (*d*). And although the trustee may, by a mortgage, or other specific lien, without notice of the trust, bind the estate or the property; yet it is not bound by any judgments, or any other claims of creditors against him (*e*). How far acts of forfeiture by the trustee ought to be allowed to bind the estate of the *cestui que trust*, has been a matter of considerable diversity of judgment, but by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), forfeiture for treason and felony has been abolished.

§ 978. What powers may be properly exercised over trust property, by a trustee, depends upon the nature of the trust, and sometimes upon the character and situation of the *cestui que trust*. Where the *cestui que trust* is of age, or *sui juris*, the trustee has no right (unless express power is given) to change the nature of the estate, as by converting land into money, or money into land, so as to bind the *cestui que trust*. But where the *cestui que trust* is not of age, or *sui juris*, it is frequently necessary to his interests that the trustee should

(*d*) *Pye v. George*, 1 P. Will. 129; *Saunders v. Dehew*, 2 Vern. 271.

(*e*) *Farr v. Newman*, 4 T. R. 621.

possess the power; and in case his interests require the conversion, the acts of the trustee, *bonâ fide* done for such a purpose, seem to be justifiable.

§ 979. It has also been laid down, as a general rule, that the *cestui que trust* may call upon the trustee for a conveyance to execute the trust (f), and that, what the trustee may be compelled to do by a suit, he may voluntarily do without a suit (g). But the latter branch of the rule admits, if it does not require, many qualifications in its practical application; for, otherwise, a trustee may incur many perils, the true nature and extent of which may not be ascertainable, until there has been a positive decision upon his acts by a court of equity, or a positive declaration by such a court, of the acts which he is at liberty to do (h).

§ 980. Passing from these more general considerations in regard to Trusts, and the jurisdiction exercised in equity over them, we may next proceed to examine them under the heads, into which they are usually divided, of Express Trusts, and Implied Trusts, the latter comprehending all those trusts, which are called constructive and resulting trusts. Express trusts are those which are created by the direct and positive acts of the parties by some writing, or deed, or will. Not that, in those cases, the language of the instrument need point out the nature, character, and limitations of the trust in direct terms *ipsissimis verbis*; for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used; and the trust can be drawn, as it were, *ex visceribus verborum*. Implied trusts are those which are deducible from the nature of the transaction, as a matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law, as matter of equity, independent of the particular intention of the parties.

§ 981. The most usual cases of express trusts are found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of lands; or in formal conveyances, such as marriage settlements, terms for years, mortgages, and other conveyances and assignments for the payment of debts, or for raising portions, or for other special purposes; or in last wills and testaments, in a variety of bequests and devises, involving fiduciary interests for private benefit or public charity. Indeed, many of these instruments (as we shall abundantly see) will also be found to contain implied, constructive and resulting trusts; and the separate consideration of them throughout would, therefore, be scarcely attainable, without frequent repetitions of the same matters as well as of the same illustrations.

(f) *Willis v. Hiscox*, 1 M. & Cr. 197; *Buttanshaw v. Martin*, Johns. 89.

(g) See *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559, 571.

(h) *Moody v. Walters*, 16 Ves. 302, 303, 307 to 314.

§ 982. In regard to each of these subjects, there are a great many nice and refined doctrines and distinctions, which have been ingrafted into equity jurisprudence, the full examination of which belongs rather to single treatises upon each particular topic, than to a general survey of the system, such as is embraced in the design of the present Commentaries. It may be added, that many of these doctrines and distinctions are the creations of courts of equity, acting upon the enlarged principles of social justice *ex æquo et bono*, rather than express trusts created by the acts of the parties, as an exposition and execution of their declared intentions. So that they may properly be said to fall within the scope of implied or constructive trusts. In our subsequent remarks upon all of these topics (which will necessarily be brief) no attempt will be made nicely to distinguish between those trusts which are express and those which are implied. Both will occasionally be blended, unless where the particular nature of the trusts calls for some discrimination between them.

CHAPTER XXIV.

MARRIAGE SETTLEMENTS.

§ 983. AND, in the first place, in regard to MARRIAGE SETTLEMENTS. Where an instrument, designed as a marriage settlement, is final in its character, and the nature and extent of the trust estates created thereby are clearly ascertained and accurately defined, so that nothing further remains to be done according to the intention of the parties, there the trusts will be treated as executed trusts, and courts of equity will construe them in the same way as legal estates of the like nature would be construed at law upon the same language. Thus, if the language of the instrument would give a fee-simple to the parents in a legal estate, they will be held entitled to a fee-simple in the trust estate (a). But where no marriage settlement has actually been executed, but mere marriage articles only for a settlement, there, courts of equity, when called upon to execute them, will indulge in a wider latitude of interpretation, and will construe the words, according to the presumed intention of the parties, most beneficially for the issue of the marriage. In executing such articles they will put it out of the power of the parents to defeat the issue, by requiring that the limitations in the marriage settlement should be what are called limitations in strict settlement; that is to say, instead of giving the parents a fee tail, the limitations will be made to them for life, with remainders to the first and other sons in succession, according to seniority, in the fee tail; and if the articles are applicable to daughters, with remainder to the daughters as tenants in common in fee-tail, with cross remainders (b) between them in case of the death of any one of the daughters without issue, with remainders over (c). And in cases of executory trusts arising under wills, a similar favourable construction will be made in favour of the issue in carrying them into effect, if the court can clearly see from the terms of the will that the intention of the testator is to protect the interests of the issue in the same way (d).

(a) *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559; *Cooper v. Kynoch*, L. R. 7 Ch. 398. Marriage settlements are not affected by the Married Women's Property Act, 1882, for by s. 19 of that Act it is provided that nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made, or to be made, whether before or after marriage, respecting the property of any married woman.

(b) Cross remainders are never implied in a deed. *Doe v. Dorvell*, 5 T. R. 518.

(c) *Rochfort v. Fitzmaurice*, 4 Dr. & War. 1.

(d) *Lord Glenorchy v. Bosville*, Cas. t. Talb. 3.

§ 984. There is, however, a distinction between executory trusts created under marriage articles, and those created under wills, which has been adverted to in some of the reported cases. In cases of marriage articles, courts of equity will, from the nature of the instrument, presume it to be intended for the protection and support of the interests of the issue of the marriage, and will, therefore, direct the articles to be executed in strict settlement, unless the contrary purpose clearly appear. For, otherwise, it would be in the power of the father to defeat the purpose of protecting and supporting such interests, and to appropriate the estate to himself. But, in executory trusts under will, all the parties take from the mere bounty of the testator; and there is no presumption that the testator means one quantity of interest rather than another, an estate for life in the parent rather than an estate tail; for he has a right arbitrarily to give what estate he thinks fit, to the parent, or to the issue. If, therefore, the words of marriage articles limit an estate for life to the father, with remainder to the heirs of his body, courts of equity will decree a strict settlement, in conformity to the presumed intention of the parties. If the same words should occur in executory trusts created by a will, there is no like presumption of intention, but in each case the matter resolves itself into a question of construction whether the instrument defines precisely the interests of the parties, or indicates the objects leaving the court to define their interests (*e*).

§ 985. In furtherance of the same beneficial purpose in favour of issue, courts of equity will construe an instrument which might, under one aspect, be treated as susceptible of a complete operation at law, to contain merely executory marriage articles, if such an intent is apparent on the face of it; for this construction may be most important to the rights and interests of the issue (*f*). So an instrument, as to one part of the property comprised in it, may be construed to be a final legal settlement; and as to other property merely to be executory articles (*g*).

§ 986. There is also a distinction in courts of equity as to the parties, in whose favour the provisions of marriage articles will be specifically executed or not (*h*). The parties seeking a specific execution of such articles may be those who are strictly within the reach and influence of the consideration of the marriage, or claiming through them; such as the wife and issue, and those claiming under them;

(*e*) *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; *Rochfort v. Fitzmaurice*, 2 Dr. & War. 1; *Egerton v. Earl Brownlow*, 4 H. L. C. 1; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 544.

(*f*) *Trevor v. Trevor*, 1 P. Will. 622; 5 Bro. P. C. 122.

(*g*) *Papillon v. Voice*, 2 P. Wms. 471; *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387; 12 Ves. 217.

(*h*) Articles were enforced in favour of husband, though he had broken the contract on his part, there being part performance by the marriage, and the covenants being independent. *Jeston v. Key*, L. R. 6 Ch. 610.

or they may be mere volunteers, for whom the settlor is under no natural or moral obligation to provide, and yet who are included within the scope of the provisions in the marriage articles; such as his distant heirs or relatives, or mere strangers. Now, the distinction is, that marriage articles will be specifically executed upon the application of any person within the scope of the consideration of the marriage, or claiming under such person; but not generally upon the application of mere volunteers (*i*). But where the action is brought by persons who are within the scope of the marriage consideration, or claiming under them, there, courts of equity will decree a specific execution throughout, as well in favour of the mere volunteers, as of the plaintiffs in the suit. So that, indirectly, mere volunteers may obtain the full benefit of the articles, in the cases where they could not directly insist upon such rights. The ground of this peculiarity is, that when courts of equity execute such articles at all they execute them *in toto* and not partially (*k*). They can rectify instruments, but cannot rectify contracts (*l*).

§ 987. It has been already stated, that, generally marriage articles will not be decreed in favour of mere volunteers (*m*). But an exception is allowed in the case of a widow who may stipulate for a benefit in favour of her children by a former marriage, and these children may enforce that provision (*n*). This decision is quite anomalous, and although too long established to be examined, or overruled, is inapplicable to the case of the children of a widower (*o*).

§ 988. In regard to terms for years and personal chattels, it may be observed, that they are capable of being limited in equity in strict settlement, so as to be transmissible, like heirlooms. The statute *de donis* only extends to real estates of inheritance. But, nevertheless, estates *pour autre vie*, and terms of years, and personal chattels are now held to be susceptible of being strictly settled, and rendered inalienable almost for as long a time as if they were strictly entailable (*p*).

§ 989. In regard to estates *pour autre vie*, they may, at law, be devised or limited in strict settlement by way of remainder, like estates of inheritance; and the remainderman will take as special occupant (*q*). But those who have an interest therein in the nature of

(*i*) § § 706*a*, 793*a*, 973.

(*k*) *Davenport v. Bishop*, 2 Y. & C. Ch. 451; 1 Ph. 698.

(*l*) *Mackenzie v. Coulson*, L. R. 8 Eq. 368, 375.

(*m*) *Ante*, § § 95, 169, 706*a*, 793*a*; *West v. Erissey*, 2 P. Will. 349; *Kettleby v. Atwood*, 1 Vern. 298, 471.

(*n*) *Newstead v. Searles*, 1 Atk. 265; *Gale v. Gale*, 6 Ch. D. 144.

(*o*) *In re Cameron and Wells*, 37 Ch. D. 30.

(*p*) *Ware v. Polhill*, 11 Ves. 257; *Campbell v. Sanders*, 1 Sch. & Lefr. 281; *Christie v. Gosling*, L. R. 1 H. L. 279; *Countess of Harrington v. Earl of Harrington*, L. R. 5 H. L. 87.

(*q*) *Low v. Burron*, 3 P. Will. 262, and Mr. Cox's notes; *Fearne on Conting. Rem.*, by Butler, pp. 493 to 499 (7th edit.).

estates tail, may bar their issue, and all remainders over, by the alienation of the estate *pour autre vie* without the formality of enrolling the assurance within six months after execution (r).

§ 990. In regard to estates in terms of years and personal chattels, the manner of settling them is different; for in them no remainder can at law be limited. But they may be entailed at law by an executory devise, or by a deed of trust in equity, as effectually as estates of inheritance, and with the same limitations as to perpetuity (s). However, the vesting of an interest in a term for years or in chattels in any person, equivalent to a tenancy in tail, confers upon such person the absolute property in such term or chattels, and bars the issue, and all subsequent limitations, as effectually as a deed enrolled would do in cases of pure entails, or as an alienation would do in the case of conditional fees, and estates *pour autre vie* (t). If, in the case of a term of years, or of chattels, the limitations over are too remote, the whole property vests in the first taker (u).

§ 991. In marriage settlements it is that we principally find limitations made to trustees to preserve contingent remainders. Trusts of this sort arose out of the doctrine in *Chudleigh's Case* (w), and *Archer's Case* (x), although it is said, that they were not put in practice until the time of the Usurpation; they represented "the most common way of conveyancing to prevent the disappointing contingent estates" so early as 1662 (y). The object of these limitations was to prevent the destruction of contingent remainders by the tenant for life, or other party, before the remainder comes *in esse*, and is vested in the remainderman. The great dispute in *Chudleigh's Case* was concerning the power of feoffees to uses, created since the Statute of Uses of 27 Henry VIII. ch. 10, to destroy contingent uses by fine or feoffment before the contingent uses came into being. It was determined, that the feoffees possessed such a power; and also, that they had in them a possibility of seisin to serve such contingent uses when they come into being, and a *scintilla juris*, or power of entry, in case their estate was divested, to restore that possibility. At this time it had not been decided that the destruction of the particular estate for life, by the feoffment or other conveyance of the *cestui que use* for life, before the contingent remainder became vested,

(r) Co. Litt. 20 a, note (5); Fearne on Conting. Rem., by Butler, pp. 493 to 499 (7th edit.); *Blake v. Luxton*, G. Coop. 178.

(s) Co. Litt. 18 b, Hargrave's note (7); Co. Litt. 20 a, Hargrave's note (5); Co. 94, 95; Fearne on Conting. Rem., by Butler, 402, 403 (7th edit.); 1 Mad. Pr. Ch. 367.

(t) *Murthwaite v. Jenkinson*, 2 B. & C. 357; *Ward v. Beville*, 1 Y. & J. 512; *Countess of Harrington v. Earl of Harrington*, L. R. 5 H. L. 87.

(u) Co. Litt. 20 a, Hargrave's note (5); 1 Mad. Pr. Ch. 367.

(w) 1 Co. 120.

(x) 1 Co. 66.

(y) *Loyd v. Brooking*, 1 Vent. at p. 189; Fearne on Conting. Rem., by Butler, 325, 326 (7th edit.);

was a destruction of the contingent remainder. But that point was settled in the affirmative a few years afterwards in *Archer's Case* (z).

§ 992. There being then at law, under these determinations, a power in the general feoffees to uses, either to preserve or to destroy these contingent uses *ad libitum*, and also a power in the *cestui que use* for life also to destroy them, there arose a necessity to remedy these defects. And it was done by limiting a vested estate to named trustees and their heirs, during the life of the person entitled to the antecedent life estate, upon an express trust to preserve such contingent remainders. So that thereby the whole inheritance might come entire to the *cestui que use* in contingency, in like manner as trustees to uses ought to have preserved them before the Statute of Uses, when they were but trusts to be executed by courts of equity (a).

§ 993. It was at first a question, whether upon such a limitation to trustees, after a prior limitation for life, they took any estate in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation, being only during his life, could not commence or take effect after his death. But it was settled, that the trustees had the immediate freehold in them, as an estate *pour autre vie*; and at law they could maintain and defend any action respecting the freehold (b). Upon this ground it is that such trustees are entitled to an injunction in equity to prevent waste in the lands, and in mines, and timber thereon; as these constitute a valuable, and sometimes the most valuable, portion of the inheritance, which the trustees are bound to preserve (c).

§ 994. On the other hand, courts of equity would treat, as a distinct breach of trust, every act of such trustees inconsistent with their proper duty, and will give relief to the parties injured by such misconduct (d). If, therefore, they should, in violation of their trust, join in any conveyance to destroy the contingent uses or remainders, they were held responsible therefor. If the persons, taking under such conveyance, were volunteers, or had notice of the trust, they were held liable to the same trusts, and decreed to restore the estate. If they were purchasers without notice, then the lands were, indeed, discharged of the trust; but the trustees themselves would be held liable for the breach in equity, and would be decreed to purchase lands with their own money, equal in value to the lands sold, and to hold them upon the same trusts and limitations as they held those sold by them (e).

(z) *Archer Case*, 1 Co. 66; *Fearne on Conting. Rem.*, by Butler, 290, and note (h); id. 291 to 301; *Chudleigh's Case*, 1 Co. 120. (a) *Garth v. Cotton*, 1 Dick. 194.

(b) *Fearne on Conting. Rem.*, by Butler, 217, 326 (7th edit.); *Parkhurst v. Smith*, Willes, 327.

(c) *Garth v. Cotton*, 1 Dick. 195 to 197, 205, 208, 219; *Stansfield v. Habbergham*, 10 Ves. 278. (d) *Garth v. Cotton*, 1 Dick. 199.

(e) *Mansel v. Mansel*, 2 P. Will. 678; *Biscoe v. Perkins*, 1 V. & B. 485; *Fearne on Conting. Rem.*, by Butler, 326, 327 (7th edit.).

§ 995. But it was not every case, in which a trustee had joined in a conveyance to destroy contingent remainders, that they would be deemed guilty of a breach of trust. In some cases courts of equity might even compel them to join in conveyances, which would affect or destroy such remainders. And, in such cases, it has been supposed that what they might be compelled to do by suit, if voluntarily done, would not be deemed a breach of trust. But the cases, in which courts of equity would compel trustees to join in such conveyances, were (as has been correctly said) rare. They had happened under peculiar circumstances; either of pressure to discharge incumbrances prior to the settlement; or in favour of creditors, where the settlement was voluntary; or for the advantage of persons, who were the first objects of the settlement; as for example, to enable the first son to make a settlement upon an advantageous marriage (f).

§ 996. There is no question, however, that the trustees might join with the *cestui que trust* in tail in any conveyance to bar the entail; for that was no breach of trust, but precisely what they might be compelled, upon seeking instructions from the court, to do; although the *cestui que trust* himself might have barred such entail without their joining in it. But there was a great distinction between cases where courts of equity would compel trustees to join in a conveyance to destroy contingent remainders, and cases where they would decree them to be guilty of a breach of trust for such an act when it was voluntarily done by them. Thus, for example, courts of equity would not punish trustees, as guilty of a breach of trust, for joining in a conveyance of the *cestui que trust* in tail, to bar the entail. And yet it is equally clear, that they would not compel them to join in such conveyance. The ground of this distinction was, that trustees to support contingent remainders were considered as honorary trustees for the benefit of the family; and the interests of mankind required them to be treated as such by all courts of justice. And unless a violation of their trust appeared, courts of equity ought not to have taken away all their discretion; or to direct them not to join in any conveyance without the order of such a court, although the trustees might be of opinion that the interests of the family required it. The effect of such a doctrine would have been to make the courts of equity the trustees of all the estates in the country (g).

§ 996a. The learning as to the duties of trustees to preserve contingent remainders has been rendered of little importance by the Amendment of the Law of Real Property Act, 8 & 9 Vict. c. 106, which enacted that a contingent remainder shall be, and if created before the passing of the Act shall be deemed to have been capable

(f) *Fearne on Conting. Rem.*, by Butler, 331 to 337 and the cases there cited; *Moody v. Walters*, 16 Ves. 283.

(g) *Fearne on Conting. Rem.*, by Butler, 331 to 337 and the cases there cited; *Moody v. Walters*, 16 Ves. 283; *Biscoe v. Perkins*, 1 Ves. & B. 485.

of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened. And by 40 & 41 Vict. c. 33, it was enacted that every contingent remainder created by any instrument executed after the passing of the Act, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

CHAPTER XXV.

TERMS FOR YEARS.

§ 998. IN the next place, in regard to TERMS FOR YEARS, whereby trusts are created to subserve the special objects of the parties. The creation of long terms for years, for the purpose of securing money lent on mortgage of the land, took its rise from the inconveniences of the ancient way of making mortgages in fee by way of feoffment and other solemn conveyances, with a condition of defeasance. For, by such mode, if the condition was not punctually performed, the estate of the mortgagee became absolute at law and was subject to incumbrances made by him, and even (as some thought) to the dower of his wife. Hence it became usual to create long terms of years upon the like condition; because, among other reasons, such terms on the death of the mortgagee became vested in his personal representatives, who were also entitled to the debt, and could properly discharge it (a). But, as this subject will be more fully considered hereafter (b), it is only necessary to say in this place, that, by analogy to the case of mortgages, terms for years were and are often created for securing portions for children, and for other special trusts. Such terms did not determine upon the mere performance of the trusts for which they were created, unless there were a special proviso to that effect in the deed. The legal interest thus continued in the trustee after the trusts were performed; although the owner of the fee was entitled to the equitable and beneficial interest therein. At law the possession of the lessee for years is deemed to be the possession of the owner of the freehold (c). And, by analogy, courts of equity held that where the tenant for the term of years was but a trustee for the owner of the inheritance, he should not oust his *cestui que trust*, or obstruct him in any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term was consolidated with the inheritance. It followed the descent to the heir, and all the alienations made of the inheritance, or of any particular estate or interest carved out of it by deed, or by will, or by act of law (d). In short, a term attendant upon

(a) Co. Litt. 290b, Butler's note (1), § 13; *ibid.* 208a, note (1); Bac. Abr. Mortgage, A.

(b) See *post*, Chapter on Mortgages, § § 1004 to 1035.

(c) *Jefferson v. Morton*, 2 Wms. Saund. at p. 22, note (4).

(d) Co. Litt. 290b, Butler's note (1), § 13.

the inheritance by express declaration, or by implication of law, may be said to be governed in equity by the same rules, generally, to which the inheritance is subject.

§ 999. Still, although the trust or benefit of the term was annexed to the inheritance, the legal interest of the term remained distinct and separate from it at law, and the whole benefit and advantage to be made of the term arose from this separation. For, if two or more persons had claims upon the inheritance under different titles, a term of years attendant upon it was still so distinct from it, that, if any one of them obtained an assignment of it, then (unless he is affected by some of the circumstances which equity considers as fraudulent, or as otherwise controlling his rights) he was entitled, both at law and in equity, to the estate for the whole continuance of the term, to the utter exclusion of all the other claimants (e). This, if the term was of long duration, absolutely deprived all the other claimants of the enjoyment of the land.

§ 999a. The learning on this subject is obsolete in England, and all satisfied terms which are attendant upon the inheritance either by express declaration or by construction of law have ceased and determined since December 31, 1845, by force of the statute 8 & 9 Vict. c. 112. And the statute also enacts that every satisfied term of years, although by the Act made to cease and determine, is to afford every person the same protection against incumbrances as it would have afforded if it had continued to exist, and then for the purpose of such protection be considered in every court of law and of equity to be a subsisting term.

(e) *Willoughby v. Willoughby*, 1 T. R. 763.

CHAPTER XXVI.

MORTGAGES.

§ 1004. IN the next place as to MORTGAGES. It is wholly unnecessary to enter into a minute examination of the origin and history of this well-known and universally received security in the countries governed by the common law. During the existence of the system of feudal tenures in its full rigour, mortgages could have had no existence in English jurisprudence, as they were incompatible with the leading objects of that system (a). The maxim of the feudal law was "Feudalia, invito domino, aut agnatis, non recte subjiciuntur hypothecæ, quamvis fructus, posse esse, receptum est" (b). But, as soon as the general right of alienation of real property was admitted, the necessities of the people almost immediately led to the introduction of mortgages (c). Littleton has enumerated two sorts, which were distinguished by the names of *vadium viduum*, and *vadium mortuum* (d). The latter was, in the common law, called a mortgage, from two French words, *mort* (*mortuum*, or dead), and *gage* (*vadium pignus*, or pledge), because if not redeemed at the stipulated time, it was dead to the debtor (e). The former was called simply a living pledge, in contradistinction to the latter, for the reason given by Lord Coke. "Vivum autem dicitur vadium, quia nunquam moritur ex aliquâ parte, quod ex suis proventibus acquiritur" (f). Thus, if a man borrowed £100 of another, and made over an estate of lands to him, until he received the same sum out of the issues and profits of the land, it was called a *vivum vadium*; for neither the money nor the land dieth or is lost. But, if a feoffment was made of land, upon condition that, if the feoffor paid to the feoffee the sum of £100 on a certain day, he might re-enter on the land; there, if he did not pay the sum at the day, he could not, at the common law, after-

(a) Glanville, Lib. 10, c. 6.

(b) Bac. Abr. *Mortgage*, A.

(c) 2 Fonbl. Eq. B. 3, ch. 1, § 1, and note (a).

(d) Litt. § § 327, 332; Co. Litt. 202b, 205a. "A *mortuum vadium* was similar to, and was probably derived from, the antichresis of the Roman Law." Edwards on Property in Land, 2 Ed. p. 223, note (h).

(e) Glanville seems to give a somewhat different explanation. "Mortuum vadium dicitur illud, cujus fructus vel redditus interim percepti in nullo se acquiescant." Glanv. Lib. 10, c. 6.

(f) Co. Litt. 205 a.

wards re-enter; but (as Littleton said) the land was taken away from him for ever, and so dead to him. And if he did pay at the day, then the pledge was dead as to the feoffee; and, therefore, the feoffee was called tenant in mortgage, the estate being *mortuum vadium* (g).

§ 1005. It has been generally supposed, that the notion of mortgages, and of the redemption thereof, in the English law, was borrowed from the Roman law, although Mr. Butler contends that they were strictly founded on the common law doctrine of conditions (h). Whatever truth there may be in this latter observation, as to the origin of mortgages of lands in the English law, there is no doubt that the notion of the equity of redemption was derived from the Roman law, and that it is purely the creature of courts of equity. In the Roman law there were two sorts of transfers of property, as security for debts; namely, the *pignus* and the *hypotheca*. The *pignus*, or pledge, was when anything was pledged as a security for money lent, and the possession thereof was passed to the creditor, upon the condition of returning it to the owner when the debt was paid. The *hypotheca* was, when the thing pledged was not delivered to the creditor, but remained in the possession of the debtor (i). In respect to what was called an *hypothecary* action there was no difference between them. “Inter pignus” (says the Institutes) “autem et hypothecam (quantum ad actionem hypothecarium attinet) nihil interest; nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur. Sed in aliis differentia est. Nam pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori; maxime si mobilis sit. At eam quæ sine traditione nuda conventionione tenetur, proprie hypothecæ appellatione contineri dicimus” (k). The Digest states the distinction with still more pregnant brevity. “Proprie pignus dicimus, quod ad creditorem transit; hypothecam, cum non transit, nec possessio ad creditorem” (l).

§ 1006. In the Roman law, it seems that the word *pignus* was often used indiscriminately to describe both species of securities, whether applied to movables or immovables. Thus, it is said in the Digest: “Pignus contrahitur non sola traditione, sed etiam nuda conventionione, etsi non traditum est” (m). But, in an exact sense, *pignus* was properly applied to movables, and *hypotheca* to immovables.

(g) Littleton, § 332; Co. Litt. 205a; 2 Black. Comm. 157.

(h) In respect to mortgages of lands, this opinion of Mr. Butler's is certainly entitled to great consideration; for Littleton expressly puts mortgages as estates on conditions. In respect to mortgages and pledges of personal property, there may have been originally a distinction, borrowed from the civil law. Glanville, Lib. 10, c. 6. Courts of equity, in a great variety of cases of both sorts, act upon the principles of the civil law.

(i) Bac. Abr. *Mortgage*, A.; *Ryall v. Rolle*, 1 Atk. 166, 167; Story on Bailments, § 286.

(k) Just. Inst. Lib. 4, tit. 6, § 7; Dig. Lib. 20, tit. 1, f. 5, § 1.

(l) Dig. Lib. 13, tit. 7, f. 9, § 2.

(m) *Ibid.* tit. 13, f. 1.

“*Pignus appellatum*” (says the Digest) “*a pugno, quia res quæ pignori dantur, manu traduntur. Unde etiam videri potest verum esse, quod quidam putant, pignus proprie rei mobilis constituti*” (n). So that it answered very nearly to the corresponding term *pledge* in the common law, which, although sometimes used in a general sense to include mortgages of land, is, in the stricter sense, confined to the pawn and deposit of personal property. In the Roman law, however, there was generally no substantial difference in the nature and extent of the rights and remedies of the parties, between movables and immovables, whether pledged or hypothecated. But in the common law, as we shall presently see, the difference as to rights and remedies between a pledge of personal property and a mortgage of real estate, or even of personal property, is very marked and important (o).

§ 1007. In the Roman law there were two sorts of actions, applicable to pledges and hypothecations; the action called *actio pignoratitia*, and that called *actio hypothecaria*. The former was properly an action *in personam*, and divisible into two sorts: (1) *Actio directa*, which lay in favour of the debtor against the creditor to compel him to restore the pledge when the debt had been paid (p); (2) *Actio contraria*, which lay in favour of the creditor against the debtor, to recover the proper value or compensation, when the latter had retained possession of the pledge, or when the title to it had failed by fraud or otherwise; or when the creditor sought compensation for expenses upon it (q). The *actio hypothecaria*, on the other hand, was strictly *in rem*, and was given to the creditor to obtain possession of the pledge, in whosoever hands it might be.

§ 1008. Without dwelling more upon topics of this sort, which are purely technical, it may be useful to state as illustrative of some of the doctrines admitted into equity jurisprudence, that under the civil law, although the debt for which the mortgage or pledge was given, was not paid at the stipulated time, it did not amount to a forfeiture of the right of property of the debtor therein. It simply clothed the creditor with the authority to sell the pledge and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the debtor. It has been supposed by some writers, that to justify such a sale, it was indispensable that it should be made under a decretal order of some court upon the application of the creditor. But, although the creditor was at liberty to make such an application, it does not appear that he might not act, in ordinary cases, without any such judicial sanction, after giving the proper notice of the intended sale, as prescribed by law, to the debtor. When the debtor could not

(n) *Ibid.* tit. 13, f. 50, tit. 16, f. 238, § 2; Story on Bailments, § 286; *Ryall v. Rowles*, 1 Ves. 358; s.c. 1 Atk. 166, 167.

(o) Story on Bailments, § 286, 287.

(p) Just. Inst. Lib. 3, tit. 15, § 4.

(q) Dig. Lib. 13, tit. 7, f. 3, § 8, 9.

be found, and notice could not be given to him, such a decretal order seems to have been necessary (*r*). And, where a sale could not be effected, a decree, in the nature of a foreclosure, could be obtained under certain circumstances, by which the absolute property would be vested in the creditor (*s*).

§ 1009. This authority to make a sale, might be exercised, not only when it was expressly so agreed between the parties, but when the agreement between them was silent on the subject. Even an agreement between them, that there should be no sale, was so far invalid, that a decretal order of sale might be obtained upon the application of the creditor (*t*). On the other hand, if by the agreement it was expressly stipulated that, if the debt was not paid at the day, the property should belong to the creditor in lieu of the debt, such a stipulation was held void as being inhuman and unjust (*u*).

§ 1010. In some cases, also, by the civil law, a sort of tacking of debts could be insisted on by the mortgagee against the mortgagor; but not against intermediate incumbrancers (*x*). And where movables and

(*r*) Cod. Lib. 8, tit. 34, f. 3, § § 1 to 3; Story on Bailments, § 309.

(*s*) Cod. Lib. 8, tit. 34, f. 3, § § 2, 3; Story on Bailments, § 309.

(*t*) Dig. Lib. 13, tit. 7, f. 4; Cod. Lib. 8, tit. 28, l. 14.

(*u*) Cod. Lib. 8, tit. 35, l. 3.

(*x*) *Ibid.* 27, f. 1; Dig. Lib. 20, tit. 4, f. 20. In a previous part of this work (§ § 415, 420) it was stated, that the doctrine of tacking mortgages was not known in the civil law. Of course, the remarks there made were applicable to the case of tacking a first and third mortgage, to the exclusion of an intermediate mortgagee; and not what may be called a tacking of debts by the mortgagee, in the case of a mortgagor seeking redemption. It is clear that the civil law, in the case of the mortgagor seeking to redeem, did not permit it, unless the mortgagor paid, not only the debt for which the mortgage was given, but all other debts due to the mortgagee. Si in possessione fueris constitutus (says the Code) nisi ea quoque pecunia tibi a debitore reddatur, vel offeratur, quæ sine pignore, debetur, eam restituere propter exceptionem doli mali non cogeris. Jure enim contendis, debitores eam solam pecuniam, cujus nomine ea pignora obligaverunt, offerentes audiri non oportere, nisi pro illa satisfecerint, quam mutuam simpliciter acceperunt. But then it is immediately added that this does not apply to the case of a second creditor. Quod in secundo creditore locum non habet; nec enim necessitas ei imponitur chirographarium etiam debitum priori creditore offere. (Cod. Lib. 8, tit. 27, f. 1.) For it was expressly held in the civil law that, where there was a first mortgage, and then a second mortgage, and then the first mortgagee lent another sum to the debtor, he could not tack it against the second mortgagee. Pothier, Pand. Lib. 20, tit. 4, n. 10; Dig. Lib. 20, tit. 4, f. 20. Mr. Chancellor Kent (4 Kent, Comm. Lect. 58, p. 136, note (*a*); *ibid.*, pp. 175, 176, 3rd edit.) has said, that, in the civil law, the mortgagee was even allowed to tack another incumbrance to his own, and thereby to gain a preference over an intermediate incumbrance; for which he cites Dig. Lib. 20, tit. 4, f. 3. If, as I presume, his meaning is, that the tacking gave a preference over the intermediate incumbrancer; with great deference, I do not find that the passage cited supports the doctrine; and it seems contrary to the passages already cited from Cod. Lib. 8, tit. 27, l. 1, and Dig. Lib. 20, tit. 4, f. 20. There are other passages in the Code, on the subject of a subsequent mortgagee acquiring the rights of a first mortgagee, by paying his mortgage, and thereby confirming his own title by substitution. But it appears to me that they do no more than subrogate the subsequent mortgagee to all the rights of the first mortgagee; and that they do not enlarge those rights. See Code, Lib. 8, tit. 18, l. 1, 5; 1 Domat, B. 3, tit. 1, § 3, arts. 7, 8; *ibid.* B. 3, tit. 1, § 6, arts. 6, 7; Heinecc. Elem. Pand. Ps. 4, tit. 4, § 35. Doctor Brown, too (1 Brown, Civ. Law,

immovables were included in the same mortgage, the movables were first to be sold and applied in the course of payment (*y*).

§ 1011. These instances are sufficient to show some strong analogies between the Roman law and the equity jurisprudence of England on the subject of mortgages, and to evince the probability, if not the certainty, that the latter has silently borrowed some of its doctrines from the former source. But to develop them at large would occupy too much space; and we may now, therefore, return to the more immediate subject of mortgages at the common law.

§ 1012. We have already had occasion to take notice of the inconveniences attendant upon the creation of mortgages in fee, and of the substitution in their stead of terms for years (*z*). But, in truth, whether the one course or the other was adopted, so far as the common law was concerned, the mortgagor was subjected to great hardships and inconveniences, if he did not strictly fulfil the conditions of the mortgage at the very time specified; as he thereby forfeited the inheritance, or the term, as the case might be, however great might be its intrinsic value, compared with the debt for which it was mortgaged.

§ 1013. Courts of equity, therefore, acting upon their general principles, could not fail to perceive the necessity of interposing to prevent such manifest mischief and injustice, which were wholly irremediable at law. They soon arrived at the just conclusion, that mortgages ought to be treated as the Roman law had treated them, as a mere security for the debt due to the mortgagee; that the mortgagee held the estate, although forfeited at law, as a pledge (*a*); and that the mortgagor had, what was significantly called an equity of redemption, which he might enforce against the mortgagee, as he could any other equitable right, if he applied within a reasonable time to redeem and offered a full payment of the debt, and of all equitable charges. The title to relief has been rested upon the general ground that time was not deemed of the essence of the contract, subject to the limitation regarding stale claims (*b*). It may also be referred "to the common rule of the court, as to conditions precedent. If the court can put the parties in the same situation as if the condition had been performed, it will never suffer a

208; *id.* 202), insists that a mortgagee might tack another incumbrance to his mortgage; and if he lent more money by way of further charge on the estate, he was, in the civil law, preferred, as to this charge also, before a mortgage, created in the intermediate time. He cites the Dig. Lib. 20, tit. 4, f. 3, which does not (as has been already stated) seem to support the conclusion. In the equity jurisprudence of England (as we have seen), the heir of a mortgagor cannot (although the mortgagor himself may) redeem without paying the bond-debt of the mortgagor, as well as the mortgage debt. *Ante*, § 418; and tacking is also permitted against mesne incumbrancers in certain cases. See *ante*, § § 412 to 419.

(*y*) Dig. Lib. 42, tit. 1, f. 15, § 2.

(*z*) *Ante*, § 998.

(*a*) *Thornbrough v. Baker*, 1 Ch. Cas. 283; 3 Swanst. 628.

(*b*) *Seton v. Slade*, 7 Ves. 265.

forfeiture to attach " (c). The latter seems the safer ground as a mortgage could not be made irredeemable by contract (d).

§ 1014. These doctrines of courts of equity, were at first strenuously resisted, and found little public favour owing to the rigid character of the common law, and the sturdy prejudices of its advocates. We are told by Lord Hale, that, in the fourteenth year of Richard II., Parliament would not admit of an equity of redemption (e), although it seems not long after to have struggled into existence (f). Even as late as the latter part of the reign of Charles II., the same great judge was so little satisfied with encouraging an equity of redemption, that in a case before him for a redemption, he declared, that by the growth of equity on equity, the heart of the common law is eaten out and legal settlements are destroyed (g). And, perhaps, the triumph of common-sense over professional prejudices has never been more strikingly illustrated than in the gradual manner in which courts of equity have been enabled to draw mortgages from the stern and unrelenting character of conditions at the common law (h). Even after the equity of redemption was admitted, it was long maintained, that if the money was not paid at the time appointed, the estate became liable in the hands of the mortgagee to his legal charges, to the dower of his wife, and to escheat (i). And it was a common opinion, that there was no redemption against those who came in by the *post*. This introduced mortgages for long terms of years, the nature of which we have already somewhat considered (k).

§ 1015. Courts of equity, having thus succeeded in establishing the doctrine, in conformity to common-sense and common justice, that the mortgage is but a pledge or security for the payment of the debt, or the discharge of the other engagements for which it was originally given; it yet remained to be determined what was the true nature and character of the equity of redemption, and of the relations between the mortgagor and mortgagee. It has been well observed, that these were not actually settled until a comparatively recent period (l). It was formerly contended that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the estate back into his own possession by payment of the debt, or other discharge of the condition. But

(c) *Taylor v. Popham*, 1 Bro. C. C. 167.

(d) *Howard v. Harris*, 1 Vern. 33, 190; *Fairclough v. Swan Brewery*, [1912] A. C. 565.

(e) *Roscarrick v. Barton*, 1 Ch. C. 219; 2 Fonbl. Eq. B. 3, ch. 1, § 2, note (c).

(f) Butler's note (1) to Co. Litt. 204 b.

(g) *Roscarrick v. Barton*, 1 Ch. C. 219.

(h) Butler's note (1) to Co. Litt. 204 b; Bac. Abr. *Mortgage*, A.

(i) *Ibid.*; 2 Black. Comm. 158.

(k) *Ante*, § 998, and note. Mr. Butler has stated the advantages and disadvantages of mortgages by way of long terms of years, in a very accurate manner in his note (1) to Co. Litt. 204 b.

(l) Com. Dig. Chancery, 4 A. 1. A trust for sale given as security is a mortgage. *Locking v. Parker*, L. R. 8 Ch. 30.

it has long been firmly established, that the mortgagor has a beneficial estate in the land in equity, which may be granted, devised, and entailed; and is liable to tenancy by the curtesy, but was not, before the Dower Act, liable to dower (*m*). Further, the mortgagor enjoys all rights incident to proprietorship (*n*).

§ 1016. In regard to the estate of the mortgagee, it being treated, in equity, as a mere security for the debt, it follows the nature of the debt. And, although, where the mortgage is in fee, before the Conveyancing Act, 1881, the legal estate used to descend to the heir of the mortgagee, yet, in equity, the estate of the mortgagee was always deemed a chattel interest and personal estate, and belonged to the personal representative as assets (*o*). And now, by s. 30 of that Act, it is enacted that where an estate or interest of inheritance, or limited to the heir as special occupant, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to, and become vested in, his personal representatives or representative from time to time, as if the same were a chattel real vesting in him or them. It is upon the same ground, that an assignment of the debt by the mortgagee carries with it, in equity, as an incident, the interest of the mortgagee in the mortgaged property; unless, indeed, the instrument of assignment contains a plain exception of the latter. The mortgagee is, however, entitled (unless there be some agreement to the contrary) to enter into possession of the lands and to take the rents and profits, if he chooses so to do. But, in such cases, he must account therefor towards the discharge of the debt, after deducting all reasonable charges and allowances (*p*). So, he may grant leases of the premises, and might, previously to the Conveyancing Act, 1881, have avoided any leases which had been made by the mortgagor subsequent to his mortgage (*q*). The learned author in this and other paragraphs had expressed the opinion that a mortgagee was a trustee for the mortgagor. He may be as soon as the debt is discharged, whatever be the means, a trustee of the land or of the surplus proceeds of sale; but so long as the relation of mortgagor and mortgagee subsists, he holds the property for his own benefit and is in no sense a trustee for the mortgagor (*r*). Accordingly a mortgagee of renewable leaseholds, if out of possession, may obtain a

(*m*) *Casborne v. Scarfe*, 1 Atk. 603; *Tarn v. Turner*, 39 Ch. D. 546.

(*n*) *Fairclough v. Marshall*, 4 Ex. D. 37; *Gelder Apsimon & Co. v. Sowerby Bridge Flour Society*, 44 Ch. D. 374.

(*o*) 2 Fonbl. Eq. B. 3, ch. 1, § 13, note (*e*); Co. Litt. 208 b, Butler's note (1); 1 Mad. Pr. Ch. 412; Com. Dig. Chancery, 4 A. 9.

(*p*) *Mayer v. Murray*, 8 Ch. D. 424. See *Parkinson v. Hanbury*, L. R. 2 H. L. 1.

(*q*) An advanced payment of rent to the mortgagor is not good against the mortgagee, though made in ignorance of the mortgage. *De Nicholls v. Saunders*, L. R. 5 C. P. 589.

(*r*) *Kirkwood v. Thompson*, 2 H. & M. 392; affd. 2 De G. J. & S. 613; *Warner v. Jacob*, 20 Ch. D. 220; *Taylor v. Russell*, [1892] A. C. 244. See *Darlow v. Cooper*, 34 Beav. 281.

renewal of the lease for his own benefit, unless there has been some fraud or underhand contrivance on his part (s). On the other hand, a mortgagor could not derogate from his grant (t).

§ 1016a. Where the mortgagee enters into possession of the mortgaged property, he is of course accountable for the rents and profits. And courts of equity will, under such circumstances, ordinarily require annual rests to be made in settling the accounts, unless the interest of the mortgage is in arrear at the time when the mortgagee takes possession, or there exist special circumstances (u). And when the principal mortgage debt is entirely paid off, annual rests upon the mortgagee's subsequent receipts are made as a matter of course (x).

§ 1016b. In respect to the rights of a mortgagee in possession, or selling under his power of sale, it may be stated that he will in equity be allowed for all repairs necessary for the support of the property; and for general improvements even if made without the acquiescence or consent of the mortgagor, provided they enhance the value of the estate, and are not of such a nature as to cripple the right or power of redemption (y). Notice to the mortgagor is only material when the expenditure is unreasonable for the purpose of showing the mortgagor acquiesced in it (z). And in no case will a court of equity permit a mortgagee to commit waste or do damage to the estate, as, for example, by pulling down cottages (a).

§ 1017. In regard to the mortgagor, he is not, unless there be some special agreement to that effect, entitled of right to the possession of the land mortgaged. But he holds it solely at the will and by the permission of the mortgagee, who may at any time, by an ejectment without giving any prior notice, recover the same against him or his tenants. In this respect, the estate of the mortgagor at law is inferior to that of a tenant at will (b). But so long as he continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right, without any account whatsoever therefor to the mortgagee (c). Indeed, for all purposes, except where the interest of the mortgagee is concerned, the mortgagor is treated as the substantial owner of the estate (d). He will not, however, be per-

(s) *Nesbitt v. Tredennick*, 2 Ball & B. 29.

(t) *Leigh v. Burnett*, 29 Ch. D. 231.

(u) *Sheppard v. Elliot*, 4 Madd. 254; *Schofield v. Ingham*, C. P. Coop. 477; *Horlock v. Smith*, 1 Coll. 287.

(x) *Ashworth v. Lord*, 36 Ch. D. 545.

(y) *Sandon v. Hooper*, 6 Beav. 246; *Tipton Green Colliery v. Tipton Moat Colliery*, 7 Ch. D. 192; *Shepard v. Jones*, 21 Ch. D. 469; *Henderson v. Astwood*, [1894] A. C. 150.

(z) *Shepard v. Jones*, 21 Ch. D. 469.

(a) *Shepard v. Jones*, 21 Ch. D. 469.

(b) Butler's note (1) to Co. Litt. 204 b; *Keech v. Hall*, Doug. 21; *Moss v. Gallimore*, Doug. 279.

(c) *Ex parte Wilson*, 2 Ves. & B. 252; *In re Hoare*, *Hoare v. Owen*, [1892] 3 Ch. 94.

(d) *Van Gelder Apsimon & Co. v. Sowerby Bridge Flour Society*, 44 Ch. D. 374.

mitted to do any acts jeopardizing the sufficiency of the security of the mortgagee (*e*).

§ 1018. As to what constitutes a mortgage, there is no difficulty whatever in courts of equity, although there may be technical embarrassments in courts of law. The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance whether this intention appear from the same instrument or from any other (*f*), it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations thereof (*g*). Even parol evidence is admissible in some cases, as in cases of fraud, accident, and mistake, to show that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage or security for money; but the evidence is to be regarded with suspicion (*h*).

§ 1019. So inseparable, indeed, is the equity of redemption from a mortgage, that it cannot be disannexed, even by an express agreement of the parties. If, therefore, it should be expressly stipulated, that unless the money should be paid at a particular day, or by or to a particular person, the estate should be irredeemable, the stipulation would be utterly void (*i*). In this respect courts of equity act upon the same principle, which (we have seen) is avowed in the civil law (*k*); and most probably it has been borrowed from that source. A distinction also is taken, like that in the civil law, between a conditional purchase, or an agreement for a repurchase, and a mortgage, properly so called (*l*). The former, if clearly and satisfactorily proved to be a real sale, and not a mere transaction to disguise a loan, will be held valid, although every transaction of this sort is watched with jealousy (*m*).

§ 1020. Mortgages may not only be created by the express deeds and contracts of the parties, but they may also be implied in equity from the nature of the transactions between the parties; and then they are termed equitable mortgages. Thus, for instance, it is now

(*e*) *Humphreys v. Harrison*, 1 Jac. & W. 581; *King v. Smith*, 2 Hare, 239.

(*f*) *Gordon v. Selby*, 11 Bligh N. S. 351; *Waters v. Mynn*, 14 Jur. 341.

(*g*) Butler's note (1) to Co. Litt. 203b.

(*h*) *Langton v. Horton*, 5 Beav. 9; *Holmes v. Matthews*, 9 Moo. P. C. 413.

(*i*) Butler's note (1) to Co. Litt. 204b; *Howard v. Harris*, 1 Vern. 190; *Fairclough v. Swan Brewery Co.*, [1912] A. C. 565.

(*k*) *Ante*, § 1009; Story on Bailm. § 345.

(*l*) Potest ita fieri pignoris datio, hypothecæ (says the Digest), ut si intra certum tempus non sit soluta pecunia, jure emptoris possideat rem, justo pretio tunc æstimandam; hoc enim casu videtur quodammodo conditionalis esse venditio. Dig. Lib. 20, tit. 1, f. 16, § 9. This approaches nearer to a right of pre-emption than to a conditional sale. See *Orby v. Trigg*, 2 Eq. Cas. Abr. 599, pl. 25; s.c. 9 Mod. 2.

(*m*) Butler's note (1) to Co. Litt. 204 b; *Goodman v. Grierson*, 2 Ball & Beat. 278; *Williams v. Owen*, 5 M. & Cr. 303; *Perry v. Meadowcroft*, 4 Beav. 197; affd. 12 L. J. Ch. 104.

settled that if the debtor deposits his title-deeds to an estate with a creditor, as security for an antecedent debt, or upon a fresh loan of money, it is a valid agreement for a mortgage between the parties, and is not within the operation of the Statute of Frauds (*n*). This doctrine has sometimes been thought difficult to be maintained either upon the ground of principle or public policy. And although it is firmly established, it was at first received with no small hesitation and disapprobation, and a disposition was strongly evinced not to enlarge its operation (*o*). It is generally applied to enforce parol agreements to make a mortgage, or to make a deposit of title-deeds for such a purpose; but it is strictly confined to an actual, immediate, and *bonâ fide* deposit of the title-deeds with the creditor (*p*), or with some other person over whom the depositor has no control (*q*); as a security, in order to create the lien. It is not necessary that all the title-deeds relating to the property should be deposited, in order to constitute a mortgage by deposit, it is sufficient that material title-deeds have been handed over (*r*). The mere deposit of title-deeds by a debtor with his creditor presumptively creates an equitable mortgage by deposit (*s*), but in the case of a claim against the estate of a dead person usually requires to be corroborated (*t*). As equity looks upon that as done which has been agreed to be done, and prefers substance to form (*u*), as indeed does the common law (*x*), handing over title-deeds with a view to the execution of a formal document will create a charge for moneys advanced, unless it appear that it was the intention of the parties that no charge should be created until a formal document was executed (*y*). A deposit of deeds may create a charge not only for moneys contemporaneously advanced, but for subsequent advances if those be the conditions agreed upon, where the original advance is made (*z*), otherwise there must be evidence to displace the objection of the Statute of Frauds (*a*). Although the charge may be available between the immediate parties the charge may not be effectual against the adverse claim of a party claiming under the mortgagor as a *bonâ fide* purchaser for value without notice, and possessed of the legal estate (*b*).

(*n*) *Russell v. Russell*, 1 Bro. C. C. 269, decided by Lord Thurlow, and Mr. Belt's note (1). See an excellent statement of the principle by Lord Abinger, C.B., *Keys v. Williams*, 3 Y. & C. Ex. 55, at p. 69.

(*o*) *Ex parte Haigh*, 11 Ves. 403; *Ex parte Hooper*, 19 Ves. 477; 1 Mer. 7.

(*p*) *Fenwick v. Potts*, 8 De G. M. & G. 506; *Ex parte Broderick*, 18 Q. B. D. 380, 766.

(*q*) *Lloyd v. Attwood*, 3 De G. & J. 214.

(*r*) *Goodwin v. Waghorn*, 4 L. J. N. S. Ch. 172; *Lacon v. Allen*, 3 Drew. 579.

(*s*) *Bozon v. Williams*, 3 Y. & J. 150.

(*t*) *Chapman v. Chapman*, 13 Beav. 308.

(*u*) *Fairclough v. Marshall*, 4 Ex. D. 37. (*x*) *Doe v. Davies*, 2 M. & W. 502.

(*y*) *Edge v. Worthington*, 1 Cox. 211; *Keys v. Williams*, 3 Y. & C. Ex. 55; *Lloyd v. Attwood*, 3 De G. & J. 614.

(*z*) *Ex parte Longston*, 17 Ves. 227; *Maugham v. Ridley*, 8 L. T. N. S. 309.

(*a*) *Ex parte Kensington*, 2 Ves. & B. 79.

(*b*) *Bozon v. Williams*, 3 Y. & J. 150; *West v. Reed*, 2 Hare, 249; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652.

§ 1021. As to the kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage. This is in conformity to the doctrine of the civil law: “*Quod emptionem venditionemque recipit, etiam pignorationem recipere potest*” (c). Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchises, and *choses in action*, are capable of being mortgaged. After considerable doubt, it is finally settled that even a mere naked possibility or expectancy, such as that of an heir or of a devisee or legatee, can validly be the subject of a mortgage (d). In this respect the civil law seems to differ from ours; for a party might by that law mortgage property, to which he had no present title by contract or otherwise (e).

§ 1022. As to the persons who are capable of mortgaging an estate, nothing need be said in this place, except so far as regards persons who have qualified interests therein, or are trustees *in autre droit*, or are clothed with particular powers for limited purposes. And here, very difficult questions may arise, as to the construction of such powers, and the competency of such persons to make mortgages. Thus, for example, if a power is given to trustees to sell for the purpose of raising money, a question may arise, whether they may raise money by way of mortgage. But the solution of such questions properly belongs to a treatise on powers (f).

§ 1023. As to the right of redemption. From what has been already stated, it is clear that the equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees, and representatives (strictly so called) of the mortgagor; but it is also in the hands of any other persons, who have acquired any interest in the lands mortgaged by operation of law, or otherwise, in privity of title (g). Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claims beneficial or available. Hence a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower, in some cases (h), a reversioner, a remainderman, a judgment creditor, a tenant by *elegit*, the lord of a manor

(c) Dig. Lib. 20, tit. 1, f. 9, § 1.

(d) *Beckley v. Newland*, 2 P. Will. 182; *Hobson v. Trevor*, 2 P. Will. 191, decided by Lord Macclesfield; *Wright v. Wright*, 1 Ves. Sen. 409, decided by Lord Hardwicke; *Wethered v. Wethered*, 2 Sim. 183; *Lyde v. Mynn*, 1 Myl. & K. 683.

(e) 1 Domat, B. 3, tit. 1, § 3, art. 5, 20. In *Ex parte Arrowsmith, In re Levison*, 18 Ch. D. 967, it was held that a mortgage of pew rents made by the vicar of a district church is void under the Act 13 Eliz. c. 20. But in *In re Mirams*, [1891] 1 Q. B. 594, it was held that the chaplain of a workhouse could make a valid mortgage of his salary, on the ground that he was not a public officer, and therefore that it was not against public policy to allow him to mortgage. *Vide supra*, § 294.

(f) Sugden on Powers, ch. 9, § 2, p. 437; *id.* art. 3, pp. 472, 478 (2nd edit.); *Mills v. Banks*, 3 P. Will. 1, 6.

(g) Co. Litt. 208, Butler's note (1).

(h) Co. Litt. 208, Butler's note (1); *Swannock v. Lifford*, Ambler, 6; *Kinnoul v. Money*, 3 Swanst. 208; *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218.

holding by escheat (*i*), and, indeed, every other person, being an incumbrancer, or having legal or equitable title, or lien therein, may insist upon a redemption of the mortgage, in order to due enforcement of their claims and interests respectively in the land (*k*). When any such person does so redeem, he or she becomes substituted to the rights and interests of the original mortgagee in the land, exactly as in the civil law. And in some cases (as we have already seen) a further right of priority by tacking may sometimes be required beyond what the civil law allowed (*l*). But no person, except a mortgagor, his heirs, or privies in estate, has a right to redeem, or to call for an account, unless, indeed, it can be shown that there is collusion between them and the mortgagee. Hence it is, that a mere annuitant of the mortgagor (who has no interest in the land) has no title to redeem (*m*).

§ 1023*b*. By the Conveyancing Act, 1881, s. 25, it is enacted that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or for redemption in the alternative. And by sub-section 2 it is enacted that in any action, whether for foreclosure or for redemption, or for sale or for the raising and payment in any manner of the mortgage-money, the court, on the request of the mortgagee, or of any person interested either in the mortgage-money, or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage-money, may, if it think fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.

§ 1024. As to the corresponding right of foreclosure, and other remedies for the mortgagee, to secure the due discharge of the mortgage, they naturally flow from the principles already stated. We have already seen (*n*), that, in the civil law, there were two remedies allowed to the mortgagee, a remedy *in rem*, and also a remedy *in personam*, against the mortgagor for the debt. The general remedy *in rem* was by a sale by the mortgagee of the mortgaged estate, either under a judicial decree, or without such a decree, by his own voluntary act of sale, after a certain fixed notice to the debtor. In either case, the sale, if *bonâ fide* and regularly made, was valid to pass the absolute

(*i*) *Downe v. Morris*, 3 Hare, 394.

(*k*) *Tarn v. Turner*, 39 Ch. D. 456.

(*l*) *Ante*, § § 412 to 421; *ante*, § 1010, and note; Com. Dig. Chancery, 4 A. 10.

(*m*) *White v. Parnter*, 1 Knapp, P. C. 229; *Troughton v. Binkes*, 6 Ves. 572.

(*n*) *Ante*, § 1007.

title to the estate against the mortgagor and his heirs; and the proceeds were first to be applied to the discharge of the debt; and the surplus, if any, was to be paid over to the mortgagor or his representatives. This seems to have been the ordinary course in the civil law, in order to obtain satisfaction of the debt out of the mortgaged estate. But in some cases, and especially where a sale could not be made effectual, a decree might be obtained, in the nature of a foreclosure, by which, after certain judicial proceedings, the absolute dominion of the property would be passed to the mortgagee (o). This was probably the origin of the present mode of extinguishing the rights of the mortgagor by a decree of foreclosure in a court of equity.

§ 1025. The natural course, and certainly the most convenient and beneficial course for the mortgagor, would seem to be, for the court to follow out the civil law rules on this subject; that is to say, primarily and ordinarily, to direct a sale of the mortgaged property, giving the debtor any surplus after discharging the mortgaged debt; and, secondly, to apply the remedy of foreclosure only to special cases, where the former remedy would not apply, or might be inadequate or injurious to the interests of the parties.

§ 1026. In England a practice widely different prevailed. In the eyes of a court of equity the property was regarded as of secondary importance to the money of which repayment was secured by the conveyance of the property. The mortgagee was entitled to sue the mortgagor, and failing satisfaction could then have recourse to the land (p), but if he proceeded against the property in the first instance, he was precluded from suing the mortgagor for any balance which the property had failed to satisfy, unless he could restore possession of the property to the mortgagor (q). Speaking generally, a bill for a foreclosure was deemed, in common cases, the exclusive and appropriate remedy; and the courts of equity refused, except in special cases, to decree a compulsory sale against the will of the mortgagor. These courts, however, departed from this general rule in certain cases: (1) where the estate was deficient to pay the incumbrance (r); (2) where the mortgagor was dead, and there was a deficiency of personal assets (s); (3) where the mortgage was of a dry reversion (t); (4) where the mortgagor died, and the estate descended to an infant (u); (5) where the mortgage was of an advowson (x); (6) where the mortgagor became bankrupt, and the mortgagee prayed a sale;

(o) *Ante*, § § 1008, 1009.

(p) *Lockhardt v. Hardy*, 9 Beav. 349.

(q) *Perry v. Barker*, 8 Ves. 527; 13 Ves. 198; *Lockhardt v. Hardy*, 9 Beav. 349; *Palmer v. Hendrie*, 27 Beav. 349; 28 Beav. 341.

(r) *Dashwood v. Bithazey*, Mos. 196.

(s) *Daniel v. Skipwith*, 2 Bro. C. C. 155.

(t) *How v. Viguers*, 1 Ch. Cas. 32.

(u) *Booth v. Rich*, 1 Vern. 295; *Mondey v. Mondey*, 1 Ves. & B. 223.

(x) *Mackenzie v. Robinson*, 3 Atk. 559.

(7) or where the mortgagor died, and the mortgagee by his bill, brought against the executor or administrator and the heir, prayed for the sale of the mortgaged estate, alleging it to be scanty security, and for the payment of any deficiency out of the general estate of the deceased mortgagor (y); (8) where the mortgage is of land, and by the local law is subject to a sale (z); such as, for example, in Ireland and America.

§ 1027. It is difficult to perceive any solid or distinct ground, upon which these exceptions stand, which would not justify the courts of equity in decreeing a sale at all times, when it is prayed for by the mortgagee, or when it would be beneficial to the mortgagor. The inconveniences of the existing practice of foreclosure are so great, that it has become a common practice to insert in mortgages a power of sale upon default of payment. And, although Lord Eldon, at first, intimated an opinion unfavourable to such a power, as dangerous, it is now firmly established, and now by statute a power of sale unless excluded by the mortgage instrument is implied in every mortgage made by deed (a).

§ 1027a. By the Chancery Improvement Act (15 & 16 Vict. c. 86) power was given to the Court of Chancery to decree a sale instead of foreclosure on such terms as the court might think fit, and if the court thought fit without previously determining the priorities of incumbrances, or giving the usual, or any time, to redeem; and this provision has been repealed, but re-enacted and enlarged by the Conveyancing Act, 1881, s. 25. A sale can under this Act be ordered of the mortgaged property on an interlocutory application made before the trial of the action by any party interested in the equity of redemption (b).

§ 1028. In actions for the redemption of mortgages, where there are various persons claiming adverse rights and limited interests in the mortgaged estate, it often becomes necessary to direct how assets and securities are to be marshalled, in order to do justice between the different claimants, and to prevent irreparable mischiefs, as well as to ascertain the amounts and proportions in which they should contribute towards the discharge of the incumbrances common to them all. This subject, in many of its most important bearings, has already been examined in other places (c). Similar principles prevailed (as we have seen), to a great extent, in the civil law, in which the right of substitution was admitted as well as what was technically called the benefit

(y) *King v. Smith*, 2 Hare, 239.

(z) *Stileman v. Ashdown*, 2 Atk. 477, 608; s.c. *Ambler* 13, and Mr. Blunt's note, p. 16, note (b); *post*, § 1216a.

(a) *Croft v. Powell*, Comyns, 603; *Anon.*, 6 Mad. 15; *Corder v. Morgan*, 18 Ves. 344. See Conveyancing Act, 1881, ss. 19, 20, 21; and Conveyancing Act, 1911, s. 5.

(b) *Woolley v. Colman*, 21 Ch. D. 169.

(c) *Ante*, § § 499, 558 to 560, 564, 565, 567, 574, 633 to 636.

of discussion, answering, in some measure, to our doctrine of marshalling assets and securities (*d*).

§ 1028*a*. In respect to the time within which a mortgage is redeemable, it may be remarked, that there is now a statutory limitation of twelve years from the time when the mortgagee has entered into possession, after breach of condition, under his title, by analogy to the ordinary limitation of rights of entry and actions of ejectment. If, therefore, the mortgagee enters into possession in his character of mortgagee, and by virtue of his mortgage alone, he is for twelve years liable to be redeemed; but if the mortgagor permits the mortgagee to hold the possession for twelve years without accounting, or without admitting that he possesses a mortgage title only, the mortgagor loses his right of redemption, and the title of a mortgagee becomes as absolute in equity, as it previously was in law. In such a case the time begins to run against the mortgagor from the moment the mortgagee takes possession in his character as such; and if it has once begun to run, and no subsequent admission is made by the mortgagee, it continues to run against all persons claiming under the mortgagor, whatever may be the disabilities to which they may be subjected (*dd*). But if the mortgagee enters, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor and the validity of the conveyance which he takes. So that, if the conveyance be such as gives him the estate of a tenant for life only in the equity of redemption, there, as he unites in himself the characters of mortgagor and mortgagee, he is bound to keep down the interest of the mortgage like any other tenant for life for the benefit of the persons entitled to the remainder; and time will not run against the remainderman during the continuance of the life estate (*e*).

§ 1028*b*. Similar considerations will, in many respects, apply to the right of foreclosure of a mortgage. If the mortgagee has suffered the mortgagor to remain in possession for twelve years after the breach of the condition, without any payment of interest, or any admission of the debt, or other duty, the right to bring an action for foreclosure will be statute barred and extinguished (*f*).

§ 1029. These may suffice as illustrations of some of the more important doctrines of courts of equity in regard to mortgages of lands, many of which are founded upon principles of justice so universal, as equally to commend themselves to the approbation of a Roman prætor

(*d*) *Ante*, § § 494, 635, 636.

(*dd*) Real Property Limitation Act, 1837 (3 & 4 Will. 4, c. 27), s. 28; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7. An acknowledgment by one of two joint mortgagees and trustees is inoperative. *Richardson v. Young*, L. R. 6 Ch. 478. Previously the court acted by analogy to the Statutes of Limitation (see *Cholmondeley v. Clinton*, 2 Jac. & W. 1; 4 Bligh, N. S. 1; *Raffety v. King*, 1 Keen, 601).

(*e*) *Raffety v. King*, 1 Keen, 601.

(*f*) Real Property Limitation Act, 1837 (3 & 4 Will. 4, c. 28); Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 9.

and of a modern judge; administering the law of Continental Europe *ex æquo et bono*.

§ 1030. Let us now pass to a brief consideration of the doctrines of equity, applicable to mortgages and pledges of personal property. A mortgage of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and, if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. The latter only passes the possession, or, at most, a special property to the pledgee, with a right of retainer, until the debt is paid, or the other engagement is fulfilled. The difference between them was well stated by a learned judge, in *Jones v. Smith (g)*. “A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, or the course of trade to be a lien upon them.”

§ 1031. In mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his action to redeem within a reasonable time (*h*). There is, however, a difference between mortgages of land and mortgages of personal property, in regard to the rights of the mortgagee, after a breach of the condition. In the latter case, although the mortgagor could obtain foreclosure (*i*), he could, upon due notice, as a general rule sell the personal property mortgaged, as he could under the civil law; and the title, if the sale be *bonâ fide* made, will vest absolutely in the vendee (*k*). And it makes no difference, whether the personal property mortgaged consists of goods or of stock or of personal annuities (*l*). But where certificate of shares or policies of life insurance are deposited without a memorandum the remedy is foreclosure and not sale (*m*). There is no statute applicable to limit the right of the mortgagee in point of time to enforce his remedy by foreclosure where the property mortgaged is personalty (*n*).

§ 1032. In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time. But if no time is fixed for the payment, the pledgor has his whole life to redeem, unless he is called upon to redeem

(g) 2 Ves. Jun. 378. See also *Carter v. Wake*, 4 Ch. D. 605.

(h) See *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Charter v. Watson*, [1899] 1 Ch. 175.

(i) *Sadler v. Worley*, [1894] 2 Ch. 170.

(k) *Tucker v. Wilson*, 1 P. Will. 261; *Lockwood v. Ewer*, 9 Mod. 275; s.c. 2 Atk. 303.

(l) *Stubbs v. Slater*, [1910] 1 Ch. 632. That on a mortgage of stocks, the identical stocks must be returned, see *Langton v. Waite*, 6 Eq. 165, 4 Ch. 402.

(m) *Harrold v. Plenty*, [1901] 2 Ch. 314.

(n) *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161.

by the pledgee; and in case of the death of the pledgor without such a demand, his personal representatives may redeem (o). Generally speaking, an action to redeem will not lie on the behalf of the pledgor or his representatives, as his remedy upon a tender is at law. But if any special ground is shown, or there has been an assignment of the pledge, an action will lie (p).

§ 1033. On the other hand, the pledgee might, according to Glanville, at any time bring an action at the common law to compel the pledgor to redeem by a given day; and, if he did not then redeem, he was for ever foreclosed of his right (q). But the equitable remedy is a sale (r). It has been also said, that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale (s).

§ 1034. There is another consideration applicable to cases of mortgages and pledges of personal property, which does not apply, or at least is not so cogent, in cases of mortgages of land. The latter pass by formal conveyances; the former may be transferred by the mere change of possession. A subsequent advance made by a mortgagee or a pledgee of chattels would attach by tacking to the property in favour of such mortgagee, when a like tacking might not be allowed in cases of real estate. Thus, for instance, in the case of a mortgage of real estate, the mortgagee cannot, as we have seen, compel the mortgagor, upon an application to redeem, to pay any debts subsequently contracted by him with, or advances made up to him by, the mortgagee, unless such new debts or advances are distinctly agreed to be made upon the security of the mortgaged property (t). But in the case of a mortgage or pledge of chattels, the general rule, or at least the general presumption, seems the other way. For it has been held, that, in such a case, without any distinct proof of any contract for that purpose, the pledge may be held, until the subsequent debt or advance is paid, as well as the original debt. The ground of this distinction is, that he who seeks equity must do equity; and the plaintiff, seeking the assistance of the court, ought to pay all the moneys due to the creditor, as it is natural to presume that the pledgee would not have lent the new sum but upon the credit of the pledge, which he had in his hands before (u). The presumption may, indeed, be rebutted by circumstances; but, un-

(o) Story on Bailments, § § 308, 345, 346, 348; Glanville, Lib. 10, cap. 6, 8; *Vanderzee v. Willis*, 3 Bro. C. C. 21.

(p) *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Jones v. Smith*, 2 Ves. Jun. 372.

(q) Glanville, Lib. 10, cap. 8; 1 Cain. Cas. Err. 204, 205.

(r) *Carter v. Wake*, 4 Ch. D. 605.

(s) *Pothonier v. Dawson*, Holt N. P. 383; *Nicholson v. Hooper*, 4 Myl. & Cr. 179; *Figot v. Cubley*, 15 C. B. N. S. 701.

(t) *Ante*, § § 417, 418; *Matthews v. Cartwright*, 2 Atk. 347; *Brace v. Duchess of Marlborough*, 2 P. Will. 491, 492, 494; *Shepherd v. Tilley*, 2 Atk. 352, 354; *Anon.*, 2 Ves. 662; *Lowthian v. Hasel*, 3 Bro. C. C. 162; *Jones v. Smith*, 2 Ves. Jun. 376, 378; *Ex parte Knott*, 11 Ves. 617.

(u) *Demaindray v. Metcalf*, Prec. Ch. 419; *Vanderzee v. Willis*, 3 Bro. C. C. 21

less it is rebutted, it will generally, in favour of the lien, stand for verity against the pledgor himself, although not against his creditors, or against subsequent purchasers (x).

§ 1035. It is not improbable, that this doctrine, respecting mortgages and pledges of chattels being held as security for subsequent debts and advances, was borrowed from the civil law, although it is applied with some modifications in the equity jurisprudence of England. In the civil law (as we have already seen), the mortgagor or pledgor could not redeem, without discharging all the other debts which he then owed to the pledgee; with the saving, however, in favour of the rights of other creditors and purchasers (y).

§ 1035a. Where property which can only reach the hands of the beneficiary in the shape of money vested in a trustee, and the beneficial interest is mortgaged by the beneficial owner, the mortgagee can acquire a better title than his assignor conveyed to him by priority of notice (z). This doctrine is applicable to absolute assignments as well as to assignments by way of mortgage and the general consideration of the subject will be discussed in the next chapter.

(x) *Demaindray v. Metcalf*, Prec. Ch. 419.

(y) *Ante*, § 1010, and note; Cod. Lib. 8, tit. 27, l. 1.

(z) *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1.

CHAPTER XXVII.

ASSIGNMENTS.

§ 1036. In the next place, let us pass to the consideration of ASSIGNMENTS of real and personal property upon special trusts. The most important and extensive of this class of trusts is that which embraces general assignments by insolvents and other debtors for the discharge of their debts, sometimes with priorities and preferences of particular creditors, and sometimes with an equality of rights among all the creditors. The question of the validity of such conveyances, and under what circumstances they are deemed fraudulent, or *bonâ fide*, has been already, in some measure, considered under the head of constructive fraud (a). In general, it may be stated, that such priorities and preferences are not deemed fraudulent or inequitable; and even a stipulation on the part of the debtor, in such an assignment, that the creditors taking under it shall release and discharge him from all their further claims beyond the property assigned, will (it seems) be valid, and binding on such creditors.

§ 1036a. In order to entitle the creditors, named in a general assignment for the benefit of creditors, to take under it, it is not necessary that they should be formal parties thereto (b). It will be sufficient, if they have notice of the trust in their favour and they assent to it; and, if there be no stipulation for a release, or any other condition in it, which may not be for their benefit, their assent will be presumed, until the contrary appears (c). Creditors' trust deeds are now subject to the provisions of the Deeds of Arrangement Act, 1914 (4 & 5 Geo. V. c. 47). They must be registered with the Registrar of Bills of Sale within seven clear days after the first execution thereof by the debtor or any creditor, or if first executed abroad within seven clear days after the time at which it would in the ordinary course of post, arrive in England, if posted within one week after the execution thereof. And it must receive the assent in writing of a majority in number and value of the creditors of the debtor, the only penalty on the creditor being that his neglect to express his dissent in writing after receiving notice in writing of the

(a) *Ante*, § § 349, 369, 370, 378, 379; *Estwick v. Caillaud*, 6 T. R. 420; *Holbird v. Anderson*, 5 T. R. 235; *Meux v. Howell*, 4 East 1; *Rex v. Watson*, 3, Price 6; *Small v. Marwood*, 9 B. & C. 300; *Pickstock v. Lyster*, 3 M. & S. 371.

(b) *Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 Russ. & M. 451; *Acton v. Woodgate*, 2 Myl. & K. 492.

(c) *In re Baber's Trust*, L. R. 10 Eq. 554; *post*, § 1045.

execution of the instrument, is to preclude him from availing himself of the assignment as an available act of bankruptcy.

§ 1037. The trusts, arising under general assignments for the benefit of creditors, were, in a peculiar sense, the objects of equity jurisdiction. But the Bankruptcy Court is now charged with the judicial administration of the property comprised in these assignments by the Deeds of Arrangement Act, 1914 (4 & 5 Geo. v. c. 47), s. 23. And this subject generally has since the Bankruptcy Act, 1914 (4 & 5 Geo. v. c. 59), lost much of its importance considered as a point of equity jurisdiction, for by s. 1 (d) of that Act, it is provided that the following (*inter alia*) should be deemed an act of bankruptcy, viz., that the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

§ 1039. In regard to particular assignments upon special trusts, there is little to be said which is not equally applicable to all cases of jurisdiction exercised over general trusts. But courts of equity take notice of assignments of property, and enforce the rights growing out of the same, in many cases, where such assignments are not recognized at law as valid or effectual to pass titles. It was a well-known rule of the common law, that no possibility, right, title, or thing in action could be granted to third persons. For it was thought that a different rule would be the occasion of multiplying contentions and suits, as it would, in effect, be transferring a lawsuit to a mere stranger. Hence a debt, or other *chose in action*, could not be transferred by assignment, except in case of the king, to whom and by whom, at the common law, an assignment of a *chose in action* could always be made; for the policy of the rule was not supposed to apply to the king (e). So strictly was this doctrine construed, that it was even doubted whether an annuity was assignable, although assigns were mentioned in the deed creating it (f). And at law, with the exception of negotiable instruments, and some few other securities, this still continued to be the general rule, unless the debtor assented to the transfer; but if he did assent, then the right of the assignee was complete at law, so that he might maintain a direct action against the debtor upon the implied promise to pay him the same, which resulted from such assent (g). But by paragraph 5 of section 25 of the Judicature Act, 1873, it is provided that any absolute assignment in writing (not purporting to be by way of charge only) of any debt or other legal *chose in action* of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive such debt or *chose in action*, shall be, and be deemed to have been effectual in law (subject

(d) See *Hamilton v. Houghton*, 2 Bligh 169.

(e) *Lampet's Case*, 10 Co. 48a; *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; Co. Litt. 232b, Butler's note (1); Com. Dig. Chancery, 2 H; Assignment, D.

(f) Co. Litt. 144b, and Hargrave's note (1); Co. Litt. 232b, Butler's note (1).

(g) *Crowfoot v. Gurney*, 9 Bing. 372; *Hutchinson v. Heyworth*, 9 A. & E. 375.

to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same without the concurrence of the assignor (*h*).

§ 1040. But courts of equity give effect to assignments of interests held in trust, and whether the interests are contingent or in expectancy, including so remote an interest as a *spes successionis*, whether they are in real or in personal estate, as well as to assignments of *choses in action* (*i*). Every such assignment is considered in equity, as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or to reduce the property into possession (*k*). Contingent rights and interests were not ordinarily assignable at law; and yet they might sometimes be assigned at law if coupled with some present interest (*l*). So, at law, such rights and interests might pass by way of estoppel, by fine or recovery but not otherwise (*m*). And by the 8 & 9 Vict. c. 106, s. 6, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure may be disposed of by deed. But the reach of this doctrine at law falls far short of that now entertained in equity. To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment (*o*). But courts of equity will support assignments not only of *choses in action*, and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; as for example “added or substituted machinery implements and things” fixed or placed in or about a mill, or future book debts (*p*). And the proprietary rights of the parties when the property becomes tangible, are fixed by reference to the antecedent contract, for equity looks upon that as done which has been agreed to be done (*q*).

(*h*) As to the effect of this, see *Brice v. Bannister*, 3 Q. B. D. 569; *Buck v. Robson*, 3 Q. B. D. 686. It should be observed that whereas a verbal assignment is good in equity, under this Act writing is necessary.

(*i*) *Fearne on Cont. Rem.* by Butler, 548, 550 (7th edit.); *Burn v. Carvalho*, 4 Myl. & Cr. 690; *In re Lind, Industrials Finance Syndicate, Ltd. v. Lind*, [1915] 2 Ch. 345.

(*k*) Co. Litt. 232 b, Butler's note; *Durham Bros. v. Robertson*, [1898] 1 Q. B. 765.

(*l*) *Shep. Touch.* 238, 239, 322; *Arthur v. Bokenham*, 11 Mod. 152; *Com. Dig. Assignment, A.*, c. 3.

(*m*) *Doe d. Christmas v. Oliver*, 10 B. & Cress, 181; *Fearne on Cont. Rem.* ch. 6, § v., p. 365

(*o*) See *Lunn v. Thornton*, 1 C. B. 379; *Petch v. Tutin*, 15 M. & W. 110.

(*p*) *Holroyd v. Marshall*, 10 H. L. C. 191; *Tailby v. Official Receiver*, 13 App. Cas. 523.

(*q*) *In re Lind, Industrials Finance Synd. v. Lind*, [1915] 1 Ch. 744; [1915] 2 Ch. 345.

§ 1040a. In the civil law, and in the jurisprudence of the modern commercial nations of continental Europe, there does not seem to have been any foundation for such an objection to the assignment of debts; for all debts were from an early period allowed to be assigned, if not formally, at least in legal effect; and for the most part, if not in all cases, they may now be sued for in the name of the assignee (*r*). The Code of Justinian says, “*Nominis autem venditio*” (distinguishing between the sale of a debt and the delegation or substitution of one debt for another or for the same debt) “*et ignorante, vel invito eo, adversus quem actiones mandantur, contrahi solet*” (*s*). And Heineccius, after remarking that bills of exchange are for the most part drawn payable to a person or his order, says, that although this form be omitted, yet an indorsement thereof may have full effect, if the laws of the particular country respecting exchange do not specially prohibit it; because an assignment thereof may be made without the knowledge and against the will of the debtor; and he refers to the passage in the Code in proof of it (*t*). But he adds (which is certainly not our law), that if the bill be drawn payable to the order of Titius, it is not to be paid to Titius, but to his indorsee. “*Tunc enim Titio solvi non potest, sed ejus indorsatario*” (*u*). The same general doctrine as to the assignability of bills of exchange, payable to a party, but not to his order, is affirmed in the ordinance of France of 1673 (art. 12), as soon as the transfer is made known to the drawee or debtor (*x*). Indeed, the like doctrine prevails now in France, not only in cases of bills of exchange, but of contracts generally; so that the assignee may now sue on them in his own name after the assignment, subject, however, to all the equities subsisting between the parties before and at the time when the debtor has notice of the assignment (*y*).

(*r*) Pothier has stated the old French law upon this subject (which does not in substance probably differ from that of the other modern States of continental Europe) in very explicit terms, in his treatise on the Contract of Sale, of which an excellent translation has been made by L. S. Cushing, Esq. See also Troplong des Privil. and Hypoth. Tome 1, un 340 to 343; Troplong de la Vente un 879 to 882, un 906, 913; Code Civ. Arts. 1689 to 1692, 2112.

(*s*) Cod. Lib. 8, tit. 42, l. 1; 1 Domat, B. 4, tit. 4, § 3, 4.

(*t*) Heinecc. de Camb. cap. 3, § 8; id. cap. 4, § 21 to 25. Heineccius, in a note, says, that in Franconia and Leipsic, no assignment is of any validity, if the formulary of its being payable to order is omitted. The present law of France is the same, so far as the general negotiability of bills is concerned, and to give them circulation, unaffected by any equities between the payee and the debtor. Pardessus, Droit Comm., Tom. 2, art. 339, p. 360; Delvincourt, Instit. Droit Comm., Tom. 1, Liv. 1, tit. 7, Pt. 2, pp. 114, 115. Delvincourt says that the right of a simple bill (not payable to order) is transferable only by an act of transfer made known to the debtor. See also Merlin, Repert. Lettre et Billet de Change, § 4, 8, pp. 196, 252 (edit. 1827).

(*u*) Heinecc. de Camb. cap. 2, § 8.

(*x*) Juosse, sur l'Ordon. 1673, art. 30, p. 123. See also Story on Bills of Exchange, § 19; Greenleaf on Evid. § 172, 190.

(*y*) Pardessus, Droit Comm., Tom. 2, art. 313; Troplong de Priv. et Hypoth., Tom. 1; Troplong de la Vente, nn. 879 to 913; Code Civil of France, art. 1689 to 1693; id. art. 2112; id. art. 1295; Loche, Esprit du Code de Comm., Tom. 1, Liv. 1, tit. 8, p. 342.

§ 1040*b*. There are, however, certain cases, in which assignments will not be upheld either in equity or at law, as being against the principles of public policy. Thus, for example, the full pay, or half-pay of an officer in the army or navy, is not, upon principles of public policy, assignable, either by the party, or by operation of law (*z*). For officers, as well upon half-pay as full pay, are liable at any time to be called into service; and it has been well remarked, that emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it. It would, therefore, be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country ought not to be taken from a state of poverty. And it has been added, that it might as well be contended, that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned (*a*). The fact, that half-pay is intended in part as a reward for past services, does not, in any respect, change the application of the principle; for it is also designed to enable the party to be always in readiness to return to the public service, if he shall at any time be required so to do (*b*). The same doctrine has been applied to the civil service, where the Government may command the future services of the party (*c*). But a retiring allowance or gratuity, where the party cannot be called upon to perform further duties, or receives the amount as a reward for past services may be aliened (*d*). In spite of the doubt expressed in previous editions, there seems no reason why an annuity payable during the pleasure of the Crown should not be assignable so long as it is continued. Obviously the terms of the grant preclude any remedy against the Crown or its agents, but the grantee may be restrained from receiving it (*e*). Alimony has been held to be non-assignable, but upon a different principle, namely, that it is not in the nature of property, but an allowance to provide for the daily maintenance of the wife (*f*).

§ 1040*c*. An assignment of a bare right to bring an action for a fraud, committed upon the assignor, will be held void, as contrary to public policy, and as savouring of the character of champerty, of which we shall presently speak (*g*). So, a mere right of action for a breach of trust for the like reason, is not assignable (*h*). On the other hand a conveyance of property carries with it the full proprietary right of the

(*z*) *Stone v. Lidderdale*, 2 Anstr. 533.

(*a*) *Davis v. Duke of Marlborough*, 1 Swanst. at p. 79.

(*b*) *Stone v. Lidderdale*, 2 Anst. 533.

(*c*) *Hill v. Paul*, 8 Ch. & F. 295; *Wells v. Foster*, 8 M. & W. 149.

(*d*) *Spooner v. Payne*, 1 De G. M. & G. 202; *Knight v. Bulkeley*, 27 L. J. Ch. 592; 15 Jur. N. S. 817; *Willcock v. Terrell*, 3 Ex. D. 323.

(*e*) *Knight v. Bulkeley*, 27 L. J. Ch. 592; 15 Jur. N. S. 817.

(*f*) *In re Robinson*, 27 Ch. D. 160.

(*g*) *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *post*, § 1048.

(*h*) *Hill v. Boyle*, L. R. 4 Eq. 260.

grantor to perfect his title even if it involves the bringing of an action (i). But the purchase must be *bonâ fide*, and not a mere cloak to purchase a right of action (k). The trustee in bankruptcy has a statutory right to sell a *res litigiosa* (l).

§ 1041. The distinction between the operation of assignments at law, and the operation of them in equity, may be very familiarly shown by a few illustrations, derived from cases of bailments and consignments. In the common case, where money or other property is delivered by a bailor to B. for the use of C., or to be delivered to C., the acceptance of the bailment amounts to an express promise from the bailee to the bailor, to deliver or pay over the property accordingly. But it was settled that the person, for whose use the money or property is so delivered could not maintain an action at law therefore against the bailee, without some further act or assent on the part of the bailee, establishing a privity between them (m). But it is certain that a remedy would lie in equity under the like circumstances (n). It may be added that no writing is necessary to the validity of an equitable assignment (o). Writing is indeed necessary if the assignment is to operate under par. 6 of section 25 of the Judicature Act, 1873, entitling the assignee to sue in his name, without making the assignor a party. An assignment which fails to comply with the formalities of the statute may yet be operative under the general rule; but here the assignor must be a party to the proceedings (p).

§ 1045. There is another class of cases, namely, those where the question may arise of an absolute appropriation of the proceeds of an assignment or remittance, directed to be paid to particular creditors, in which courts of equity, like courts of law, will not deem the appropriation to the creditors absolute, until the creditors have notice thereof, and have assented thereto. For, until that time, the mandate or direction may be revoked or withdrawn, and some other appropriation made by the consignor or remitter of the proceeds (q). But if, upon notice, the creditors should assent thereto, and no intermediate revocation

(i) *Dickinson v. Burrell*, L. R. 1 Eq. 337; *Fitzroy v. Cave*, [1905] 2 H. B. 364.

(k) *De Hoghton v. Money*, L. R. 2 Ch. 164.

(l) *Sesar v. Lawson*, 15 Ch. D. 426; *Gury v. Churchill*, 40 Ch. D. 481.

(m) *Williams v. Everett*, 14 East, 582.

(n) *Ex parte South*, 3 Swanst. 392; *Burn v. Carvalho*, 4 M. & Cr. 690, where the plaintiff having failed at law (4 B. & Ad. 382; 1 A. & E. 883) succeeded in equity. It is really "pedantry to refer to authorities"—per Lord Macnaghten, *William Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A. C. 454.

(o) *Gurnell v. Gardner*, 4 Giff. 626.

(p) *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765; *William Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A. C. 454.

(q) *Scott v. Porcher*, 3 Meriv. 662; *Ex parte Hall*, 10 Ch. D. 615; *Wallwyn v. Coutts*, 3 Meriv. 707, 708; s.c. 3 Sim. 14; *Garrard v. Lord Lauderdale*, 4 Russ. & Myl. 451; *Gaskell v. Gaskell*, 2 Y. & Jerv. 502; *Maber v. Hobbs*, 2 Y. & Jerv. 327; *Clegg v. Rees*, L. R. 7 Ch. 71; ante, § § 972, 1036a. Acquiescence, e.g., refraining to sue, as stipulated in deed, may have the same effect as direct assent. *In re Baber's Trusts*. L. R. 10 Eq. 554.

should have been made by the assignor or remitter; there, in equity, the assignee or mandatary will be held bound to the creditors, and they may maintain a bill to enforce a due performance of the duty. For, although the assignee or mandatary has a perfect right, in such a case, to refuse the trust; yet he cannot act under the mandate, and receive the money, goods or proceeds, and hold them discharged from the duty thus created. The property is in his hands, clothed with the duty, by the act of parties, competent to create and establish it; and his assent is not, in strictness, necessary to give validity to it in equity (r).

§ 1047. The assignee takes the property assigned, subject to all equities existing between the assignor and his debtor or trustee at the date of the assignment (s); unless there is a contract varying the general rule (t). But the assignee may obtain a better title than his assignor possessed. The doctrine is only applicable where there is a debt or where the fund "can only reach the hands of the beneficiary or assignor in the shape of money" (u). It has no application where the property conveyed is land (w). The rule, it cannot properly be called a principle, established by *Dearle v. Hall*, and *Loveridge v. Cooper* (x), is that when there are successive conveyances to separate parties without notice of the title of a prior assignee (y), the priority of the assignees *inter se* is regulated by the date at which the debtor or trustee (z) receives notice of the assignee's title. It seems clear that the rule in *Dearle v. Hall* and *Loveridge v. Cooper* cannot be questioned at the present day, but the grounds upon which the decision was based have since met with scant courtesy (a). It becomes necessary, therefore, to examine the working of the rule. As between assignor and assignee the title of the assignee is complete by the assignment, be it a trust fund (b) or a debt (c), and whether voluntary or for value (d). The trustee or debtor may deal with the assignor on the footing that he is entitled to the fund or debt, until they receive notice of an actual assignment (e),

(r) *Ex parte South*, 3 Swanst. 392; *Burn v. Carvalho*, 4 M. & Cr. 690; *William Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A. C. 454.

(s) *Courtenay v. Williams*, 3 Hare 539, affd. 15 L. J. Ch. 204.

(t) *In re Goy & Co., Ltd.*, *Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149.

(u) Per Lord Macnaghten, *Ward v. Duncombe*, [1893] A. C. 369, 390; *Foster v. Cockerell*, 3 Cl. & F. 456; *In re Hughes' Trusts*, 2 H. & M. 89; *Lloyds' Bank v. Pearson*, [1901] 1 Ch. 865.

(w) *In re Richards*, *Humber v. Richards*, 45 Ch. D. 589; *Hopkins v. Hemsworth*, [1898] 2 Ch. 347; *Taylor v. London and County Bank*, [1901] 2 Ch. 231.

(x) *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1.

(y) *Newman v. Newman*, 28 Ch. D. 674; *In re Holmes*, 29 Ch. D. 786.

(z) *Lloyd v. Banks*, L. R. 3 Ch. 988.

(a) *Ward v. Duncombe*, [1893] A. C. 369.

(b) *Burn v. Carvalho*, 4 M. & Cr. 690.

(c) *Gorringe v. Irwell India Rubber and Gutta Percha Works*, 34 Ch. D. 128.

(d) *Hughes v. Walmesley*, 12 Jur. 834n.; *In re Way's Trusts*, 2 De G. J. & S. 365.

(e) *Leslie v. Baillie*, 2 Y. & C. Ch. 91; *Stocks v. Dobson*, 4 De G. M. & G. 11; *Fhipps v. Lovegrove*, L. R. 16 Eq. 80; *Shaw v. Foster*, L. R. 5 H. L. 321.

but the assignor cannot defeat his own grant and is accountable for any sums of money he may receive (f). In *Dearle v. Hall* and *Loveridge v. Cooper*, one of the grounds of the decision was that the priority was a reward of superior diligence, but it has since been held that if a trustee acquired his knowledge of the transaction from a perusal of a newspaper it was sufficient (g), and it is difficult to distinguish the case of a debtor. A clear verbal notice is sufficient, but the evidence in the case of a conflict as to priorities is to be scanned jealously (h).

§ 1047a. Before the notice can be effectually given, there must be an actual debt, or the fund must be in the hands of trustees or effectually transferred to them (i). Notice to one of several trustees (not being himself an assignor) (k) is effective so long as that trustee remains a trustee of the fund (l); but if he dies the priority thus gained will be displaced in favour of a subsequent assignee if he gives prior notice of his assignment to the then existing trustees (m). A priority once acquired by notice to all the trustees remains notwithstanding their retirement or death, and the appointment of new trustees (n).

§ 1048. It is principally in cases of assignments that courts of equity have occasion to examine into the doctrine of champerty and maintenance; and therefore it may be here proper to glance at this important topic. Champerty (*campi partitio*) is properly a bargain between a plaintiff or a defendant in a cause, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense (o). Maintenance (of which champerty is a species) is properly an officious intermeddling in a suit, which no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it (p). Each of these is deemed an offence against public justice, and punishable accordingly, both at the common law and by statute, as tending to keep alive strife and contention, and to pervert the remedial process of the law into an engine of oppression.

§ 1049. It was chiefly upon the ground of champerty and maintenance, that the courts of common law refused to recognize the assignment of debts, and other rights of action and securities; although (as

(f) *In re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82.

(g) *Lloyd v. Banks*, L. R. 3 Ch. 488.

(h) *In re Tichener*, 35 Beav. 317. Choses in action other than trade debts "due or growing due" are no longer within the order and disposition clause: Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 38 (c).

(i) *Buller v. Plunket*, 1 J. & H. 441; *Stephens v. Green*, [1895] 2 Ch. 148; *In re Dallas*, [1904] 2 Ch. 385.

(k) *Browne v. Savage*, 4 Drew. 635; *In re Dallas*, [1904] 2 Ch. 385.

(l) *Meux v. Bell*, 1 Hare 73; *Ward v. Duncombe*, [1893] A. C. 369.

(m) *Timson v. Ramsbottom*, 2 Keen, 35; *In re Phillips' Trusts*, [1903] 1 Ch. 183.

(n) *In re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. 163.

(o) *Sprye v. Porter*, 7 E. & B. 58; *Rees v. De Bernardy*, [1896] 2 Ch. 437.

(p) *Harris v. Brisco*, 17 Q. B. D. 504; *Neville v. London "Express" Newspaper, Ltd.*, [1919] A. C. 368.

we have seen) the same doctrine does not prevail in equity. But still, courts of equity are ever solicitous to enforce all the principles of law respecting champerty and maintenance; and they will not, in any case, uphold an assignment, which involves any such offensive ingredients (*q*). Thus, for instance, courts of equity, equally with courts of law, will repudiate any agreement or assignment made between a creditor and a third person, to maintain a suit of the former, so that they may share the profits resulting from the success of the suit; for it will be a clear case of champerty (*r*). So, an assignment of a part of the subject of a pending prize suit, to a navy agent, in consideration of his undertaking to indemnify the assignor against the costs and charges of the suit, will be held void; for it amounts to champerty, in being the unlawful maintenance of a suit, in consideration of a bargain for part of a thing, or some profit out of it (*s*). The exceptions to the general rule are of certain peculiar relations recognized by the law; such as that of father and son; or of an heir-apparent; of the husband of an heiress; or of master and servant; or motives of charity (*t*); and the like.

§ 1050. But consistently with these principles, a party may purchase, by assignment, the whole interest of another in a contract, or security, or other property which is in litigation, provided there be nothing in the contract which savours of maintenance; that is, provided he does not undertake to pay any costs, or make any advances beyond the mere support of the exclusive interest, which he has so acquired (*u*). Thus, for example, it is extremely clear, that an equitable interest, under a contract of purchase of real estate, may be the subject of sale. A person, claiming under such an original contract, in case he afterwards sells his purchase to sub-purchasers, becomes, in equity, a trustee for the persons to whom he so contracts to sell. Without entering into any covenant for that purpose, such sub-purchasers are obliged to indemnify him from the consequence of all acts, which he must execute for their benefit. And a court of equity not only allows, but actually compels, him to permit them to use his name in all proceedings for obtaining the benefit of their contract. Such indemnity and such proceedings, under such circumstances, are not deemed maintenance. So if there be a trust estate in lands, either actual or constructive, which, however, is controverted by the trustee, the *cestui que trust* (or beneficiary) may, nevertheless, lawfully assign it; and the assignee may, in equity, enforce his rights to the same, if the assignment does not, in the sense above stated, savour of maintenance.

(*q*) *Reynell v. Sprye*, 1 De G. M. & G. 660; *Rees v. De Bernardy*, [1896] 2 Ch. 437.

(*r*) *Hartley v. Russell*, 2 Sim. & St. 244.

(*s*) *Stevens v. Bagwell*, 15 Ves. 156.

(*t*) 4 Black. Comm. 135; *Harris v. Briscoe*, 17 Q. B. D. 504.

(*u*) *Harrington v. Long*, 2 M. & K. 590; *Hunter v. Daniel*, 4 Hare, 420; *Fitzroy v. Cave*, [1905] 2 K. B. 364.

§ 1051. This doctrine has been fully recognized by Lord Eldon. "If G. and W. (the original vendees), during the pendency of the suit in the Exchequer, sold the estate to A. B., he would have a right in a court of equity to insist, as purchaser of the estate, that they should convey to him the fee-simple, or such title as they had. So insisting, he claims no more than they would be entitled to claim, if they had not sold their equitable interest. Having sold, they become trustees of that equitable interest; their vendee acquires the same right which they had, that is, a right to call on the original vendors indemnifying them against all costs and charges for the use of their names, to enable them to execute the sub-contract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this court, which has always given to parties, entering into a sub-contract, the benefit which the vendors derived from the primary contract" (x).

§ 1052. Upon the like grounds, where a creditor, who had instituted proceedings at law and in equity against his debtor, entered into an agreement with the debtor to abandon those proceedings, and give up his securities, in consideration of the debtor's giving him a lien on other securities in the hands of another creditor, with authority to sue the latter, and agreeing to use his best endeavours to assist in adjusting his accounts with the holder, and in recovering those securities; it was held, that the agreement was lawful, and not maintenance; for there was no bargain, or colour of bargain, that the assignee should maintain the suit, instituted in the assignor's name, against such creditor, having the other securities, in consideration of sharing in the profits to be derived from that suit. The agreement was, in effect, nothing more than an assignment of the equity of redemption of the assignor in the securities held by such creditor in exchange for the prior securities held by the assignee. The authority, given to the assignee to sue such creditor, was the common legal provision in the case of an assignment of a debt or security (y).

§ 1053. Where, by articles of agreement for the sale of an estate, it was agreed between the vendor and purchaser, that the purchaser, bearing all the expenses of certain suits, commenced by the vendor against an occupier for by-gone rents, should have the rents so to be recovered, and also any money recovered for dilapidations, and that the purchaser, at his own expense, and indemnifying the vendor, might use the name of the vendor, in any action he might think fit to commence therefor; it was held at the common law, that the agreement was not void for maintenance or champerty (z).

(x) *Per* Lord Eldon, in *Wood v. Griffith*, 1 Swanst. 56.

(y) *Hartley v. Russell*, 2 Sim. & Stu. 244.

(z) *Williams v. Protheroe*, 5 Bing. 309; s.c. 3 Y. & Jerv. 129.

§ 1054. Indeed, there is no principle in equity, which prevents a creditor from assigning his interest in a debt after the institution of a suit therefor as being within the statutes against champerty and maintenance. Such an assignment gives the person, to whom it is made, a right to institute a new proceeding, in order to obtain the benefit of the assignment. And the proper mode of doing this was by the assignee's filing a supplemental bill (if the suit is still pending), making the assignor and the debtor defendants. But, if the assignment contains an agreement, that the assignee is to indemnify the assignor, not only against all costs incurred, and to be incurred, with reference to the subject-matter assigned, but also against all costs to be incurred in that suit for collateral objects and claims, totally distinct from the subject-matter assigned, it will be held void for maintenance (a).

§ 1055. So strongly are courts of equity inclined to uphold assignments, when *bonâ fide* made, that even the assignment of freight to be earned in future, is good in equity, and will be enforced against the party from whom it becomes due (b). So an assignment of a whale-ship, by way of mortgage, and of all oil, head-matter, and other cargo caught or brought home on a whaling voyage, will amount to a good assignment of the future cargo of oil and head-matter obtained in the voyage (c). And, whenever an assignment is made of a debt, or other personal property, although it is charged on land, as, for example, a pecuniary legacy charged on land, the assignment will be treated as an assignment of money only, and, therefore, it will not be affected by the policy of the registration laws, by which conveyances of the interests in the land are required to be registered (d).

§ 1056. In courts of law, these principles of courts of equity were, even before the Judicature Act, 1873, acted on to a limited extent. But still, whenever a bond or other debt was assigned, and it was necessary to sue at law for the recovery thereof, it had to be done in the name of the original creditor, the person to whom it was transferred being treated rather as an attorney than as an assignee, although his rights were recognized, and protected, in some measure, at law, against the frauds of the assignor (e).

§ 1057. In equity, on the other hand, the assignee might always sue on such an assignment in his own name, and enforce payment of the debt directly against the debtor, making him, as well as the

(a) *Harrington v. Long*, 2 Myl. & K. 590. The report in this case is somewhat obscure, and does not exactly present the true ground of the decision. But the argument of the counsel for the defendant, in pages 558, 599, shows it. Provision for assignment of interest is now made by Rules of the Supreme Court, 1883, Order 17.

(b) *Douglas v. Russell*, 4 Sim. 524; 1 Myl. and K. 488.

(c) *Langton v. Horton*, 1 Hare 549, 556, 557; s.c. 5 Beav. 9.

(d) *Malcolm v. Charlesworth*, 1 Keen 63.

(e) *Ex parte South*, 3 Swanst. 393; *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765; *Barker v. Richardson*, 1 Y. & J. 362.

assignor (if necessary), a party to the action. The assignment of a debt does not, in equity, require even the assent of the debtor, in any manner, thereto; although, to make it effectual for all purposes, it may be important to give notice of the assignment to him; since, until notice, he is not affected with the trust created thereby, and the rights of third persons may intervene to the prejudice of the assignee. The ground of this doctrine is, that the creditor has, in equity, a right to dispose of his own property as he may choose; and to require the debt to be paid to such person as he may direct, without any consultation with the debtor, who holds the debt, subject to the rights of the creditor (f).

(f) *Hammond v. Messenger*, 9 Sim. 327.

CHAPTER XXVIII.

WILLS AND TESTAMENTS.

§ 1058. IN the next place, let us pass to the consideration of express trusts of real and personal property, created by LAST WILLS AND TESTAMENTS. These are so various in their nature and objects, and so extensive in their reach, that it would be impracticable to comprehend them within the plan of these commentaries. They are most usually created for the security of the rights and interests of infants, of *femes covert*, of children, and of other relations; or for the payment of debts, legacies, and portions, or for the sale or purchase of real estate for the benefit of heirs, or others having claims upon the testator; or for objects of general or special charity. Many trusts, also, arise under wills, by construction and implication of law. But in whatever way, or for whatever purpose, or in whatever form, trusts arise under wills, they are exclusively within the jurisdiction of courts of equity. Indeed, so many arrangements, modifications, restraints, and intermediate directions are indispensable to the due administration of these trusts, that, without the interposition of courts of equity, there would, in many cases, be a total failure of justice (a).

§ 1059. The truth of this remark will at once be seen by the statement of a very few plain cases, to illustrate it. In the first place, trusts are often created by will, without the designation of any trustee who is to execute them; or it may be matter of doubt, upon the terms of the will, who is the proper party. Now it is a settled principle in courts of equity, as has been already stated, that a trust shall never fail for the want of a proper trustee (b); and, if no other is designated, courts of equity will take upon themselves the due execution of the trust.

§ 1060. Thus, for example, if a testator should order his real estate, or any part thereof, to be sold for the payment of his debts, without saying who should sell, in such a case a clear trust would be created. Modern legislation has rendered this example of no importance in England, for the legal estate would now vest in the personal representatives of the testator, and they would be the parties to execute the

(a) As to charges on real estate, for the payment of debts, see *post*, § 1246.

(b) *Ante*, § 976; Co. Litt. 290, b, Butler's note (1), § 4.

trust and to sell and convey the land and receive the purchase-money (c).

§ 1061. In the next place, let us suppose the case of a will giving power to trustees to sell an estate upon some specified trust, and they should all refuse to execute the trust, or should all die before executing it. Now, it was a well-known rule of the common law, that powers are never imperative; but the acts to be done under them were left to the free will of the parties to whom they are given. The same rule was applied at law to such powers, even when coupled with a trust. Hence, in the case supposed, the trust would at law be wholly gone. The trustees, if living, could not at law be compelled to execute the trust; and by their death the power could be entirely extinguished (d). But a court of equity regarded a special power as in the nature of a trust, and enforced its execution accordingly, either by the original trustees or substituted trustees, or in administration proceedings (e).

§ 1062. In regard to powers, too, some nice distinctions were taken at law, which often required the interposition of courts of equity. Thus, for instance, it was a general rule of law that a mere naked power, given to two, could not be executed by one; or, if given to three, could not be executed by two, although the other were dead; for, in each case, it was held to be a personal trust in all the persons, unless some other language was used to the contrary. Then, suppose a testator, by his will, should give authority to A. and B. to sell his estate, and should make them his executors, in such a case, it has been said, that the survivor could not sell (f). But, if the testator should give authority to his executors (*eo nomine*) to sell, and should make A. and B. his executors, there, if one should die, the survivor (it has been said) could sell (g). Now, by force of the Trustee Act, 1893 (56 & 57 Vict. c. 53), section 22, and of the Conveyancing Act, 1911 (1 & 2 Geo. V., c. 57), section 8, a power or trust vested in two or more trustees survives and may be executed by the survivors or survivor or the personal representative of a sole or last surviving trustee, unless the instrument creating the power or trust contains a provision to the contrary.

§ 1063. Upon the construction of wills also many difficult questions arise, as to the nature and extent of powers, and the manner in which they are to be executed. It would occupy too great a space to enter into a general examination, even of the leading authorities upon this subject. But one or two illustrations may not be without use, rather

(c) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 14, 15, 16; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part 1; *In re Barrow-in-Furness and Rawlinson's Contract*, [1903] 1 Ch. 663.

(d) Co. Litt. 113 a, Hargrave's note (2).

(e) *Harding v. Glynn*, 1 Atk. 469; *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *In re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436.

(f) Co. Litt. 112b, 113a, and Hargrave's note (2).

(g) Co. Litt. 112b.

to open the mind to some of the doubts which may arise, than to satisfy inquiries (*h*). Thus, for example, where a testator directed that, if his personal estate and house and lands at W. should not pay his debts, then his executors should *raise* the same out of his copyhold estate; it became a question whether the terms of the power authorized a *sale* of the copyhold estate. It was held that they did (*i*).

§ 1064. This is a comparatively simple question. But suppose a will should contain a direction or power to raise money out of the rents and profits of an estate, to pay debts or portions, &c., a question might then arise, whether such a power would authorize a sale or mortgage of the estate under any circumstances; as, for instance, if it were otherwise impracticable, without the most serious delays and inconveniences, to satisfy the purposes of the trust. Now, this is a point upon which great authorities have entertained opposite opinions. At one time it was held that the power should be restricted to the mere application of the annual rents and profits, but the modern cases hold to a more reasonable construction, that a conveyance for value or by way of gift of the entire income is in substance and effect a gift of the capital, unless qualified by words restricting a gift of the income to a particular time or otherwise limited, or unless the circumstances render such a construction unreasonable (*k*). *Prima facie*, therefore, the donee of the power might, if necessary for the purposes of the trust, sell or mortgage the estate.

§ 1064c. A power to raise money by sale or mortgage of real estate was held to authorize a mortgage with a power of sale (*l*). But a devise of real estate to trustees, in fee upon trust, "out of the rents, issues, and profits," "and such other means (except a sale) as they may think proper, to levy and raise sufficient to pay off the charges on the estate," does not give the trustees the power to raise the charges, either by sale, by mortgage, or by leases on fines, but they must be raised out of the rents, and the profits of timber and mines (*m*). And where the testator charged certain of his lands with the payment of a mortgage upon other lands (which he also devised specially), and with the payment of his debts generally, but gave no express power of sale, it was held that the executor took a power of sale by implication, and that the purchaser of the executor took the land discharged of all equity in favour of the devisee (*n*). At the

(*h*) Sugden, Powers, chap. 4, § 1, chap. 8, § 1.

(*i*) *Bateman v. Bateman*, 1 Atk. 421.

(*k*) *Allan v. Backhouse*, 3 Ves. & B. 64, Jac. 631; *Bootle v. Blundell*, 1 Mer. 193; *Metcalfe v. Hutchinson*, 1 Ch. D. 481; *In re Tubbs, Dykes v. Tubbs*, [1915] 1 Ch. 540.

(*l*) *Bridges v. Longman*, 24 Beav. 27; *In re Chawner's Will*, L. R. 8 Eq. 569. See *Earl Vane v. Rigden*, L. R. 5 Ch. 663.

(*m*) *Bennett v. Wyndham*, 23 Beav. 521.

(*n*) *Robinson v. Lowater*, 5 De G. M. & G. 272; *Greetham v. Colton*, 34 Beav. 615. See also *Corser v. Cartwright*, L. R. 7 H. L. 731.

present day a mortgage by deed incorporates presumptively a power of sale by force of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 19. It has been suggested that where the trustee is not authorized to grant a power of sale he should exclude this provision. There is, however, a power to order a judicial sale under section 25, and the suggested difficulty seems unsubstantial.

§ 1065. In the next place, independently of the consideration of powers, many very embarrassing questions arise as to the nature and extent of the limitations of trust, properly so called, under last wills; as to the persons who are to take; and also as to the interest they are to take in the trust property. Many of these trusts require the positive interposition and direction of courts of equity, before they can be properly or safely executed by the parties in interest, so as to protect them against future litigation and controversy. And it not unfrequently happens, that the final administration, settlement, and distribution of the assets of the testator, real and personal, must stand suspended, until the aid of some court of equity has been invoked, and a judgment is obtained, containing a declaration of the nature and extent of these trusts, of the parties who are entitled to take, and of the limitations of their respective interest; and also providing means, by reference to a master, whereby the cross-equities and conflicting claims of various persons, such as creditors, trustees, legatees, devisees, heirs, and distributees, may be clearly ascertained and definitely established (o). Thus, for example, upon a will creating a trust for the payment of debts, and charging them, as well as legacies, upon the real estate of the testator, it may often be a matter of serious difficulty to ascertain, from the words of the will, whether the personal estate is to be wholly exonerated from the payment of the debts and legacies; or whether it is to be the primary fund, and the real estate only to be auxiliary thereto. And in each case, if the charges on the real estate are not sufficient to exhaust the whole, in what manner the charges are to be borne and apportioned among the different devisees and heirs (p). Until these questions are settled by a court of equity, it will be impossible for the executors or trustees (as the case may be) to proceed to a final settlement of the various claims, without manifest danger of having all their proceedings overhauled in some future proceeding (q).

(o) This subject has been already somewhat considered under the heads of Account, Administration, Legacies, and Marshalling of Securities. *Ante*, ch. 8, 9, 10, 13.

(p) See 2 Powell on Devises, by Jarman, ch. 35, pp. 664 to 714, and notes; 1 Mad. Pr. Ch. 466 to 488. See *Forrest v. Prescott*, L. R. 10 Eq. 545; *Powell v. Riley*, L. R. 12 Eq. 175.

(q) Some of these difficulties have been already touched, in considering the doctrines respecting the marshalling of assets and securities. *Ante*, § § 558 to 580, 633 to 645. See also the notes of Mr. Cox to *Howell v. Price*, 1 P. Will. 294, note (1), and to *Evelyn v. Evelyn*, 2 P. Will. 664, note (1), as to the point whether the personal estate is to be deemed the primary fund for the payment of debts and legacies, or not. See also 1 Mad. Pr. Ch. 467 to 488; *id.* 498 to 506.

§ 1065a. It is entirely beyond the province of this book to deal with the interests of beneficiaries under wills, a subject which belongs to the law of property and has nothing to do with any jurisprudence peculiar to courts of equity. It may be sufficient to indicate to the student that words of known legal import may be qualified by the general language of the will or by explanatory phrases, and that the judicial interpretation of a will may now be obtained cheaply and expeditiously under the Rules of the Supreme Court, 1883, O. LV., rule 3.

§ 1066. There are also some rules of construction of the words of wills, adopted by courts of equity in relation to trusts, which are different from those which are adopted by courts of law in construing the same words in relation to mere legal estates and interests. We have already had occasion to take notice of this distinction, in remarking upon the difference between executed and executory trusts. In the former, courts of equity follow the rules of law in the interpretation of the words; in the latter, they often proceed upon an interpretation widely different (*r*).

§ 1067. In regard also to legacies and bequests of chattels and other personal property, courts of equity (as we have seen) treat all such cases as matters of trust, and the executor as a trustee for the benefit of the legatees, and as to the undisposed residue of such property, as a trustee for the next of kin (*s*). The rules, therefore, adopted by courts of equity, in expounding the words of wills in regard to bequests of personal property, are not precisely the same as those adopted by courts of law in interpreting the same words as to real estate. For courts of equity, having succeeded to the jurisdiction of the ecclesiastical courts over these matters, and these courts, in the interpretation of legacies being governed by the rules of the civil law, courts of equity have followed them in such interpretation, rather than the rules of the common law where they differ (*t*).

§ 1068. In the interpretation of the language of wills, also, courts of equity have gone great lengths, by creating implied or constructive trusts from mere recommendatory and precatory words of the testator. The best exposition is that stated by Lord Alvanley, "Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly, that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it" (*u*). And where the object is charity, the established rule is followed, and a trust will be raised if a general

(*r*) *Ante*, § 974. See as to executory trusts, *Thompson v. Fisher*, 10 Eq. 207.

(*s*) *Ante*, § § 593, 595.

(*t*) *Ante*, § § 4, 602; *Crooks v. De Vandes*, 9 Ves. 197.

(*u*) *Malim v. Keighley*, 3 Ves. 333, 335, *affd.* 3 Ves. 529. See also *In re Hamilton*, *Trench v. Hamilton*, [1895] 2 Ch. 370; *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84.

charitable intention is expressed, although a definite charitable institution is not named (*x*). The cases are very numerous and difficult to reconcile, and many will endorse the opinion of a very eminent judge, "that the officious kindness of the court of chancery in interposing trusts where, in many cases, the father of the family never meant to create trusts, must have been a very cruel kindness indeed" (*y*). And as was said at an earlier date, "The first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions, has, of late years, been against converting the legatee into a trustee" (*z*). Those words were spoken in 1827 and have found an echo in subsequent cases (*a*), but the definition of Lord Alvanley has twice been endorsed in the House of Lords (*b*). It has been suggested that too little attention has sometimes been paid to the fact that where the precatory words follow an absolute gift, the raising of a precatory trust after the death of the beneficiary infringes the rule of construction that an absolute gift shall not be cut down but by the clearest words. Still the common law furnishes cases illustrative of a similar result. Thus, where lands were devised to A. and his heirs, but if he should die without having settled or otherwise disposed of the estates so devised, or without leaving issue of his body then over, it was held that A. took an absolute estate with an executory gift over which had been defeated by A.'s conveyance (*c*). Without going through the cases in detail, it will be sufficient for the purposes of the student to note that a precatory trust has been raised upon the use of the words, "advise him to settle it" (*d*), "hoping" (*e*), "desiring" (*f*), "It is my dying request" (*g*), "It is my request" (*h*), "I recommend" (*i*), "Save the prayer hereinafter contained convinced of the high sense of honour and probity of my son-in-law A., I entreat him" (*k*), "In full confidence" (*l*), "Feeling assured and

(*x*) *In re Burley, Alexander v. Burley*, [1910] 1 Ch. 215.

(*y*) *James, L. J., Lambe v. Eames*, L. R. 6 Ch. 597, 599.

(*z*) *Sale v. Moore*, 1 Sim. 534.

(*a*) *Lambe v. Eames*, L. R. 6 Ch. 597; *In re Adams and the Kensington Vestry*, 27 Ch. D. 394.

(*b*) *Knight v. Boughton*, 11 Cl. & F. 513; *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84.

(*c*) *Beechcroft v. Broome*, 4 T. R. 441.

(*d*) *Porter v. Bolton*, 5 L. J. N. S. Ch. 98.

(*e*) *Harland v. Trigg*, 1 Bro. C. C. 142.

(*f*) *Cruwys v. Colman*, 8 Ves. 319; *In re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549.

(*g*) *Pierson v. Garnett*, 2 Bro. C. C. 38, 226.

(*h*) *Bernard v. Minshule*, Johns. 276.

(*i*) *Lord Kingston v. Lord Lorton*, 2 Hog. 166; *Ford v. Fowler*, 3 Beav. 146; *Cholmondeley v. Cholmondeley*, 14 Sim. 590.

(*k*) *Prevost v. Clarke*, 2 Mad. 458.

(*l*) *Wace v. Mallard*, 25 L. J. Ch. 355; *Corniskey v. Bowring-Hanbury*, [1905] A. C. 84.

having every confidence" (*m*), "Well knowing" (*n*), "Not doubting" (*o*), "Trusting" is a word of art, and plainly implies a trust (*p*).

§ 1071. In respect to certainty in the description of objects or persons in such recommendatory trusts, it may be proper to state, that it is not indispensable that the persons should be described by their names. But mere general descriptions will often amount to a sufficient designation of the persons to take; such, for example, as "sons," "children," "family," and "relations"; if the context fixes the particular persons who are to take, clearly and definitely. Thus a provision by way of precatory trust in favour of the family of A. would indicate the heir in the case of freehold lands (*q*), but in the case of personalty would include all members related to the donee of the power, but if the power were not exercised a gift over in favour of relations or family would be restricted to children or next of kin (*r*).

§ 1073. In the next place, as to certainty in the description of property, or rather, as to what property is bequeathed. If it appears that the person upon whom a precatory trust is sought to be imposed had it in his power to diminish the capital of the property, there the trust will fail from want of a sufficiently definite subject-matter (*s*).

§ 1074. These may suffice as specimens of the curious refinements in the interpretation of wills, which courts of equity have adopted in creating constructive trusts; in which, indeed, they have often been followed by courts of law in regard to legal estates (*t*). It is highly probable, that some of these refinements were borrowed from the civil law, in which the distinction between pure legacies, and legacies clothed with trusts, was well known. Thus, it is said, "Legatum, est, quod legis modo, id est imperativè, testamento reliquitur. Nam ea quæ precativo modo relinquuntur, fideicommissa vocantur." And again, "Fideicommissum est, quod non civilibus verbis, sed precativè reliquitur; nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis" (*u*). And then, by the way of illustration, it is declared, "Fideicommittere his verbis possumus; rogo, peto, volo, mando, deprecor, cupio, injungo. Desidero, quoque et impero verba, utile faciunt fideicommissum: relinquo, vero, et commendo, nullam fideicommissi pariunt actionem" (*x*). Some of these shades of distinction are ex-

(*m*) *Gully v. Cregoe*, 24 Beav. 185.

(*n*) *Briggs v. Penny*, 3 Mac. and G. 546

(*o*) *Parsons v. Baker*, 18 Ves. 476.

(*p*) *Baker v. Mosley*, 12 Jur. 740.

(*q*) *Wright v. Atkyns*, 17 Ves. 255; s.c. 19 Ves. 301; *G. Coop.* 116; *Griffiths v. Evan*, 5 Beav. 241.

(*r*) *Grant v. Lynam*, 4 Russ. 292; *Liley v. Hey*, 1 Hare 580; *In re Hutchinson and Tennant*, 8 Ch. D. 540.

(*s*) *Curtis v. Rippon*, 5 Mad. 434; *Sale v. Moore*, 1 Sim. 534; *Lambe v. Eames*, L. R. 6 Ch. 597.

(*t*) *Doe v. Smith*, 5 M. & S. 126; *Doe v. Joinville*, 3 East 172.

(*u*) Pothier, Pand. Lib. 30, tit. 1 to 3, n. 3.

(*x*) Ibid.; Inst. B. 2, tit. 24, § 3; Cod. Lib. 6, tit. 43, l. 2; Dig. Lib. 31, tit. 2, f. 77 *passim*.

tremely nice, and almost evanescent; especially that between the words “deprecor, peto,” and “desidero,” and the words “relinquo” and “commendo.” Again, “Etiam, hoc modo; cupio des, opto des, credo te daturum, fideicommissum est (*y*). Et eo modo relictum; exigo, desidero uti des, fideicommissum valet (*z*). Verba, quibus testator ita caverat; non dubitare se, quodcumque uxor ejus cepisset liberis suis redditurum, pro fideicommisso accipienda” (*a*). In these last citations we may clearly trace the origin, or at least the application, of some of our modern equity doctrines.

(*y*) Dig. Lib. 30, tit. 1, f. 115.

(*z*) Ibid. f. 118.

(*a*) Dig. Lib. 31, tit. 2, f. 67, § 10.

CHAPTER XXIX.

ELECTION AND SATISFACTION.

§ 1075. It is in cases of wills also, that the doctrine respecting ELECTION AND SATISFACTION must frequently, though not exclusively, arise in practice, and is acted upon and enforced by courts of equity. Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take, has a choice, but he cannot enjoy the benefits of both (*a*).

§ 1076. Thus, for example, if a testator should, by his will, give to a legatee an absolute legacy of ten thousand pounds, or an annuity of one thousand pounds per annum during his life, at his election; it would be clear that he ought not to have both; and that he ought to be compelled to make an election, whether he would take the one or the other. This would be a case of express and positive election (*b*). But suppose, instead of such a bequest, a testator should devise an estate belonging to his son, or heir-at-law, to a third person; and should, in the same will, bequeath to his son, or heir-at-law, a legacy of one hundred thousand pounds, or should make him the residuary devisee of all his estate, real and personal. It would be manifest, that the testator intended that the son or heir should not take both, to the exclusion of the other devisee; and therefore he ought to be put to his election which he would take; that is, either to relinquish his own estate, or to compensate the party disappointed, or in the case of a testator his estate, out

(*a*) Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 394, note (*b*); *Thellusson v. Woodford*, 13 Ves. 220, 2 Mad. Pr. Ch. 40 to 49; Jeremy on Eq. Jurisd. B. 3 Pt. 2, ch. 5, pp. 534 to 538. Mr. Swanston's note is drawn up with great ability and learning; and I have freely used it in the discussion of this topic. The whole subject of election is also most elaborately examined in *Roper on Legacies* by White, vol. 2, ch. 23, pp. 480 to 578, to which the attention of the learned reader is invited. It is wholly inconsistent with the nature of these Commentaries to discuss all the minute distinctions belonging to it, interesting and important as they certainly are. The subject of election has formed the subject of an exhaustive treatise, by George Serrell, Esq., M.A., LL.D., to which the reader is further referred.

(*b*) See *Parker v. Sowerby*, 4 De G. M. & G. 321; *Linley v. Taylor*, 1 Giff. 67.

of the bequest under the will. This would be a case of implied or constructive election (*c*).

§ 1077. Now, the ground upon which courts of equity interfere in all cases of this sort (for at law there is no direct remedy to compel an election) is, that the purposes of substantial justice may be obtained by carrying into full effect the whole intentions of the testator (*d*). And in regard to the cases of implied election, it has been truly remarked, that the foundation of the doctrine is still the intention of the author of the instrument; an intention, which, extending to the whole disposition, is frustrated by the failure of any part, but such intention may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention (*e*). Its characteristic, in its application to these cases, is, that by equitable arrangement, full effect is given to a donation of that which is not the property of the donor. This principle is applicable to the case of invalid provisions affecting appointment under powers. If a valid appointment is made to an object of the power burdened with a provision not warranted by the power, the appointment will be good and the invalid provision will be rejected, and as the only fund out of which compensation is to be sought is the appointed property, no case arises to which the equitable doctrine of election can apply (*f*). But if the donee of the power makes a gift out of his own property to the object of the power, then the appointee must make compensation out of the property so given, if he elects to defeat the wishes of the donee so far as they are invalid (*g*).

§ 1078. The doctrine of election, like many other doctrines of equity jurisprudence, appears to have been derived from the civil law. By that law, a bequest of property which the testator knew to belong to another was not void; but it entitled the legatee to recover from his heir either the subject of his bequest, or, if the owner was unwilling to part with that at a reasonable price, the pecuniary value. Thus, it is said in the Institutes, that a testator may not only bequeath his own property, or that of his heir, but also the property of other persons; so that the heir may be obliged to purchase and deliver it; or, if he cannot purchase it, to give the legatee its value (*h*). But ordinarily, to give effect to a legacy in such a case, the testator must have known that the property so bequeathed by him belonged to another; and not have been ignorant of the fact, and supposed the property was his own. “Hære-

(*c*) *Streatfield v. Streatfield*, Cas. t. Talb. 176; *Bristow v. Warde*, 2 Ves. Jur. 336; *Howells v. Jenkins*, 1 De G. J. & S. 617.

(*d*) *Crosbie v. Murray*, 1 Ves. Jun. 557, 559.

(*e*) *In re Vardon's Trusts*, 31 Ch. D. 375; *Haynes v. Foster*, [1901] 1 Ch. 361.

(*f*) *Carver v. Bowles*, 2 Russ. & M. 304; *Woolridge v. Woolridge*, Johns. 63; *Churchill v. Churchill*, L. R. 5 Eq. 44.

(*g*) *In re White*, *White v. White*, 22 Ch. D. 555.

(*h*) Inst. B. 2, tit. 20, § 4, tit. 24, § 2; Dig. Lib. 30, tit. 1, f. 30, § 7; Dig. Lib. 31, tit. 2, f. 67, § 8; 1 Swanst. 396, note.

dum etiam res proprias '' (says the Code) '' per fideicommissum relinqui posse, non ambigitur '' (i).

§ 1079. In the civil law, also, wherever the heir or devisee took an estate under a will, containing burdensome legacies, or any disposition of his own property in the manner above mentioned, he was at liberty to accept or to renounce the inheritance. But (it has been said) he had no other alternative. He could not accept the benefit, offered by the will, and retain the property, of which it assumed to dispose, upon the terms of compensation or indemnity to the disappointed claimant. The effect, therefore, of an election to take in opposition to the will, was a renunciation of all the benefits offered by it. The effect of an election to take under the will was different according to the subject-matter. If the property, of which the will assumed to deprive the devisee, was pecuniary, he was compelled to perform the bequest to the extent of the principal and interest which he had received; if the property was specific, then a peremptory obligation was imposed upon him to deliver that very thing, although exceeding the amount of the benefit conferred on him (k).

§ 1080. The earliest cases, in which the doctrine of election was applied in English jurisprudence, seems to have been those arising out of wills; although it has since been extended to cases arising under other instruments (l). It has been suggested on more than one occasion that Lord Redesdale stated that the doctrine of election constitutes a rule of law, as well as of equity (m). But it does not require a critical reading of the passage to appreciate that Lord Redesdale is adverting to the equivocal nature of the expression election, which may mean a right of choice which was the purely equitable doctrine, and the exercise of that right which was known to the common law (n), and generally referred to under the head of Estoppel, and also known in equity where it worked as an estoppel but did not oust a right to a further benefit by way of compensation.

§ 1081. Whatever may be the truth of the case as to the recognition of the doctrine of election in courts of law, it is very certain that it is principally enforced in courts of equity, where, indeed, the jurisdiction to compel the party to make an election is admitted to be exclusive. But, independent of this broad and general ground of jurisdiction, the doctrine must be exclusively enforced in equity, in all cases of mere trust estates; or where there is the intervention of complicated cross

(i) Cod. Lib. 6, tit. 42, l. 25.

(k) Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 396.

(l) Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 397, 400, 401; *Bigland v. Huddleston*, 3 Bro. C. C. 285, note, Belt's edition, and his note (3); *Green v. Green*, 9 Meriv. 86; s.c. 19 Ves. 665. It appears, from Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 397; id. 443, 444, that traces of the interposition of courts of equity can be found as early as the reign of Queen Elizabeth.

(m) *Birmingham v. Kirwan*, 2 Sch. & L. 444, 450.

(n) *Lythgoe v. Vernon*, 5 H. & N. 180.

equities between different persons, claiming in different degrees, and under different limitations and titles; or where conveyances are necessary to be decreed; or where the recompense is not of a nature, capable of being applied as a bar at law. Thus (to put a plain case), at the common law not collateral recompense, made in satisfaction of dower, or of a right of freehold, could be pleaded in bar of such right of freehold or of dower (o). But, in equity, it would be clearly held obligatory; and the party would be perpetually enjoined against asserting the title at law, or put to an election, as the circumstances of the case might require (p).

§ 1082. In the actual application of the doctrine of election, courts of equity proceed upon principles, which are wholly incapable of being enforced in the like manner by courts of law. Thus, for example, suppose a case of election under a will, which disposes of other property of a devisee; and the devisee should elect to hold his own property, and renounce the benefit of the devise under the will, or (as the compendious phrase is) should elect against the will; in such a case, it is clear that the party disappointed of his bequest or devise by such an election, would, at law, be wholly remediless. The election would terminate all the interest of the parties respectively in the subject-matter of the devise to them. The election to hold his own estate would, of course, maintain the original title of the devisee; and his renunciation of the intended benefit in the estate devised to him would leave the same to fall into the residuum of the testator's estate, as property undisposed of.

§ 1083. But the subject is contemplated in a very different light by courts of equity; for, in the event of such an election to take against the instrument, courts of equity will compel the devisee to make up to the disappointed claimants the amount of their interest therein; for it is now definitely settled that the party claiming against the will does not forfeit his interest thereunder, but is bound to provide out of the property willed to him a pecuniary compensation for those disappointed by his election (q).

§ 1084. The reasoning, by which this doctrine is sustained, has been stated by Sir William Grant, in his usual clear and felicitous manner. "If," said he, "the will is in other respects so framed as to create a case of election, then not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will; but, in contemplation of equity, the testator means, in case the condition shall not be complied with, to give the disappointed devisees,

(o) Co. Litt. 36b; 1 Swanst. 426, 427, note.

(p) *Lawrence v. Lawrence*, 2 Vern. 366, and Mr. Raithby's note (1); 1 Swanst. 398, note.

(q) *Bristow v. Warde*, 2 Ves. Jun. 336; *Howells v. Jenkins*, 1 De G. J. & S. 617. The curious will find the conflicting decisions and *dicta* referred to in the notes to *Gretton v. Haward*, 1 Swanst. 409; and to *Dillon v. Parker*, 1 Swanst. 359.

out of the estate over which he had a power, a benefit, correspondent to that which they are deprived of by such non-compliance. So that the devise is read, as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees, as to so much of the estate given to him as shall be equal in value to the estate intended for them" (r).

§ 1086. In regard to the point, when an election may be insisted on, or not, everything must (it is obvious) depend upon the language of the particular will; and it is difficult, therefore, to lay down many general rules on the subject. On the one hand it may be stated, that, in order to raise a case of election there must be a clear intention, expressed on the part of the testator, to give that which is not his property (s). A mere recital in a will, that A. is entitled to certain property, but not declaring the intention of the testator to give it to him, would not be a sufficient demonstration of his intention to raise an election (t). So, if a debtor, by his will, should recite the amount of the debt, erroneously overstate the sum, and direct the payment of it, and also should bequeath to the creditor a legacy; in such a case the creditor would be put to his election, unless it appeared or was to be inferred that the testator did not mean to pay the full amount of the actual debt (u).

§ 1087. Upon the same ground, a case of election cannot ordinarily arise where property is devised in general terms; as, a devise of "all my real estate in A.," which estate is subject to the claims of a devisee or legatee; for it is not apparent that he meant to dispose of any property but what was strictly his own, subject to that charge (x).

§ 1087a. Upon similar grounds, where a testatrix gave a legacy to B., in satisfaction of all claims upon the estate, he having, at the time, a claim upon the testatrix, in respect to a legacy under the will of C., it was held, that evidence of there being no other claim by B. against the testatrix, was inadmissible; and that B. was not, therefore, compellable to elect between the benefit under the will of the testatrix, and that of C. (y). The obvious reason for the decision is, that the language of the testatrix did not, by any means, clearly point to any extinguishment of the claim under the will of C., and might well be satisfied by supposing it used solely with reference to any claims *ex directo* against her estate.

§ 1088. It was upon this principle that, prior to the Dower Act, 1833, a doweress could claim a testamentary provision in addition to

(r) *Welby v. Welby*, 2 Ves. & B. 190, 191.

(s) *Att.-Gen. v. Earl of Lonsdale*, 1 Sim. 105.

(t) *Dashwood v. Peyton*, 18 Ves. 41; *Box v. Barrett*, L. R. 3 Eq. 244; *In re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348.

(u) *Whitfield v. Clemment*, 1 Mer. 402; *In re Wood, Ward v. Wood*, 32 Ch. D. 517; *In re Kelsey, Woolley v. Kelsey*, [1905] 2 Ch. 465.

(x) *Stevens v. Stevens*, 3 Drew, 697; 1 De G. & J. 62; *Evans v. Evans*, 2 N. R. 409.

(y) *Dixon v. Samson*, 2 Y. & Coll. Ex. 566.

her dower, unless made manifestly with the intention of its being in satisfaction (z).

§ 1089. It is upon a similar ground, that the doctrine of election has been held not to be applicable to cases where the testator has some present interest in the estate disposed of by him, although it is not entirely his own. In such a case, unless there is an intention clearly manifested in the will, or (as it is sometimes called) a demonstration plain, or necessary implication on his part, to dispose of the whole estate, including the interest of third persons, he will be presumed to intend to dispose of that which he might lawfully dispose of, and no more (a).

§ 1090. It may be stated, as a general proposition, that apart from express provision (b), there can be no case of election raised where there are gifts contained in the same instrument (c). Thus, for instance, if a man should, by his will, give a child, or other person, a legacy or portion, in lieu or satisfaction of a particular thing expressed, that would not exclude him from other benefits, although it might happen to be contrary to the will; for courts of equity will not construe it, as meant in lieu of everything else, when the testator has said it is in lieu of a particular thing (d).

§ 1091. Again, if a legatee should decline one benefit charged with a portion, given him by a will, he would not be bound to decline another benefit, unclogged with any burden, given him by the same will (e). So, if a legatee cannot obtain a particular benefit, designed for him by a will, except by contradicting some part of it, he will not be precluded by such contradiction, from claiming other benefits under it (f).

§ 1092. It may be added, that the doctrine of election is not applied to the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claims upon other funds disposed of by the will; for a creditor claims not as a mere volunteer, but for a valuable consideration, and *ex debito justitiæ* (g).

§ 1093. On the other hand, it is sufficient to raise a case of election in equity, that the testator does dispose of property which is not his own, without any inquiry whether he did so, knowing it not to be

(z) *Bending v. Bending*, 3 K. & J. 257.

(a) *Stevens v. Stevens*, 3 Drew. 697; 1 De G. & J. 62; *Evans v. Evans*, 2 N. R. 409.

(b) *Talbot v. Earl of Radnor*, 3 M. & K. 252.

(c) *Woolaston v. King*, L. R. 8 Eq. 165; *In re Lord Chesham, Cavendish v. Dacre*, 31 Ch. D. 466. The subject is discussed at length in reference to the earlier cases in the notes to *Dillon v. Parker*, 1 Swanst. 359; and to *Gretton v. Haward*, 1 Swanst. 409.

(d) *East v. Cook*, 2 Ves. Sen. 23; *Dillon v. Parker*, 1 Swanst. 404, 405, note. See *Wilkinson v. Dent*, L. R. 6 Ch. 339.

(e) *Andrews v. Trinity Hall*, 9 Ves. 534; *Warren v. Rudall*, 1 Johns. & H. 1.

(f) See *Dillon v. Parker*, 405, note.

(g) *Kidney v. Coussmaker*, 12 Ves. 136; *Cooper v. Cooper*, L. R. 7 H. L. 53.

his own, or whether he did so under the erroneous supposition that it was his own. If the property was known not to be his own, it would be a clear case of election. If it was supposed erroneously to be his own, still, there is no certainty that his intention to devise it would have been changed by the mere knowledge of the true state of the title; and the court will not speculate upon it (*h*). So, although a part of the benefits proposed by a will should fail, the remainder may constitute a case for an election (*i*).

§ 1094. Upon the ground of intention, also, where a testator has an absolute power to dispose of the subject, and an intention is clearly expressed in his will to exercise that power, it will be sufficient to raise a case of election (*k*). The familiar illustration was that of a devise by a testator, having an absolute power to dispose of an estate, to his heir; in this case, before the Inheritance Act, 1833, the heir would have taken by descent, and the devise would have been inoperative, whether the heir admitted or disputed the will; yet, if the testator in his will devised an estate belonging to the heir to a third party the heir would have been put to his election between the estate devised, which came to him by the bounty of the testator, and his own claims so far as adverse to the will.

§ 1095. It was, at one time, supposed, that the doctrine of election was not applicable to the case of persons claiming a remote interest in property disposed of in a manner adverse to other rights; as, for instance, to a remainderman, claiming after an estate tail in the property disposed of (*l*). But this qualification is long since overruled and it is now well established, that the doctrine of election is equally applicable to all interests, whether they are immediate or remote, vested or contingent, of value or of no value, and whether these interests are in real or in personal estate (*m*).

§ 1097. Questions have also arisen in courts of equity, as to what acts or circumstances should be deemed an election on the part of the person bound to make it. Upon such a subject no general rule can be laid down; but every case must be left to be decided upon its own particular circumstances rather than upon any definite abstract doctrine. Lapse of time alone is not sufficient to conclude a party, for until he is called upon to elect he may enjoy all proprietary rights over the respective properties (*n*); and before he can be called upon to elect he is entitled to have the respective values of the properties

(*h*) *Whistler v. Webster*, 2 Ves. Jun. 370; *Thellusson v. Woodford*, 13 Ves. 220; *Welby v. Welby*, 2 Ves. & B. 199; Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 407; *In re Brooksbank*, *Beauclerk v. James*, 20 Ch. D. 160.

(*i*) *Newman v. Newman*, 1 Bro. C. C. 186; 1 Swanst. 402, note.

(*k*) Sugden on Powers, ch. 11, § 5, par. 6; *Whistler v. Webster*, 2 Ves. Jun. 367.

(*l*) See *Bor v. Bor*, cited 3 Bro. Parl. C. 167, note; 1 Swanst. 407, note.

(*m*) *Wilson v. Lord Townsend*, 2 Ves. Jun. 697; *Dillon v. Parker*, 1 Swanst. 408, note; *Webb v. Earl of Shaftesbury*, 7 Ves. 488.

(*n*) *Spread v. Morgan*, 11 H. L. C. 588; *Seaton v. Seaton*, 13 App. Cas. 61.

ascertained to enable him to form a correct opinion as to his rights (o). To conclude a party by his extra-judicial acts it is necessary to show that he knew all the facts, that the fact that he was called upon to exercise his choice was present to his mind, and that these two circumstances concurring he deliberately made his choice (p). It would perhaps be sufficient if it could be shown affirmatively that the party had made his election intentionally with an express waiver of his rights, *quolibet potest renunciare juri pro se introducto* (q). The acts of a party entitled to a future interest are not to be regarded as so deliberate as those of a person entitled to a present interest (r). When this is ascertained affirmatively, it may be further necessary to consider, whether the party was competent to make an election; whether he can restore the other persons affected by his claim to the same situation, as if the acts had not been performed, or the acquiescence had not existed; and, whether there has been such a lapse of time as ought to preclude the court from entering upon such inquiries, upon its general doctrine of not entertaining suits upon stale demands, or after long delays (s).

§ 1097a. The doctrine being based upon compensation, there can be no election where there is no fund out of which the disappointed party is to be compensated (t). Where the gift is tainted with illegality, motives of policy prevent the operation of the doctrine of election, for that might attain illegal ends by indirect means (u).

§ 1097b. In the case of infants, the court will elect as a result of enquiries in chambers or upon the evidence adduced in court (x); and the same practice used to be followed in the case of married women prior to the passing of the Married Women's Property Act, 1882 (y). In the case of lunatics so found by inquisition, the committee of the estate acts under the sanction of the Lords Justices sitting in Lunacy (z). In the case of other lunatics, the court itself exercises the right to elect (a). In the case of a married woman restrained from anticipation, the fetter may now be removed to enable her to make an election (b).

(o) *Whistler v. Webster*, 2 Ves. Jun. 367; *Douglas v. Douglas*, L. R. 12 Eq. 617; *Wilson v. Thornbury*, L. R. 10 Ch. 239.

(p) *Spread v. Morgan*, 11 H. L. C. 588; *Wilson v. Thornbury*, L. R. 10 Ch. 239.

(q) See *per Parke, B.*, *Kelly v. Solari*, 9 M. & W. 54, 58, 59.

(r) *Padbury v. Clark*, 2 Mac. & G. 298.

(s) Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 382, where the principal authorities are collected. See *Brice v. Brice*, 2 Moll. 21.

(t) *Woolridge v. Woolridge*, Johns. 63; *Churchill v. Churchill*, L. R. 5 Eq. 44; *In re Vardon's Trusts*, 31 Ch. D. 275; *Haynes v. Foster*, [1901] 1 Ch. 361.

(u) *In re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191.

(x) *Lamb v. Lamb*, 5 W. R. 772.

(y) *Wilson v. Lord Townshend*, 2 Ves. Jun. 693; *Cooper v. Cooper*, L. R. 7 H. L. 63.

(z) *In re Hewson*, 23 L. J. Ch. 256.

(a) *Wilder v. Piggott*, 22 Ch. D. 263

(b) Conveyancing Act, 1881, s. 39. See as to the old law, *Robinson v. Wheelright*, 6 De G. M. & G. 535.

§ 1099. These remarks may suffice on the subject of election, a doctrine of no inconsiderable nicety and difficulty in its natural administration in equity; and we shall now proceed to the kindred doctrine of *Satisfaction*. SATISFACTION may be defined in equity to be the donation of a thing, with the intention expressed or implied that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in courts of equity as a matter of presumption, where a man, being under an obligation to do an act (as to pay money), does that by will, which is capable of being considered as a performance or satisfaction of it, the thing performed being *ejusdem generis* with that which he has engaged to perform. Under such circumstances, and in the absence of all countervailing circumstances, the ordinary presumption in courts of equity is, that the testator has done the act in satisfaction of his obligation. Although the original text has been allowed to stand unaltered, it is advisable to warn the student that there is a branch of equity known as performance which has nothing to do with satisfaction, and is discussed hereafter. Another matter in respect of which the student may be led astray is the language of the judgments which speak of the gift being adeemed. In ademption properly so called the subject-matter is destroyed, in satisfaction it exists, but one provision is held to be a substitute for another.

§ 1100. It is certainly not a little difficult to vindicate the extent to which this doctrine has been carried in courts of equity, as a matter of presumption. What is given by a will ought, from the character of the instrument, ordinarily to be deemed as given as a mere bounty, unless a contrary intention is apparent on the face of the instrument (*c*); or, as it has been well expressed, whatever is given by a will is, *primâ facie*, to be intended as a bounty and benevolence (*d*). Under such circumstances, the natural course of reasoning would be, that, in order to displace this presumption, a clear expression of a contrary intention should be made out on the face of the will (*e*). But the doctrine of courts of equity has proceeded upon an opposite ground; and the donation is held to be a satisfaction, unless that conclusion is repelled by the nature of the gift, the terms of the will, or the attendant circumstances. For it has been said that a man shall be intended to be just, before he is kind; and when two duties happen to interfere at the same point of time, that which is the most honest and best is to be preferred (*f*).

§ 1101. But although this may be fair reasoning, where there is a deficiency of assets to satisfy both claims or duties, yet it is utterly

(*c*) *Clarke v. Sewell*, 3 Atk. 96.

(*d*) *Eastwoode v. Vincke*, 2 P. Will. 616.

(*e*) But see *Weall v. Rice*, 2 Russ. & Myl. 267, where Sir John Leach intimates that the rule is as it ought to be, but without stating any reason. See also *Jones v. Morgan*, 2 Y. & Coll. 403, 412.

(*f*) *Per* Lord Cottenham, L.C., in *Pym v. Lockyer*, 5 Myl. & Cr. 29, 35

impossible to apply it to the great mass of cases in which the doctrine of implied satisfaction has prevailed, and where there has been no deficiency of assets to discharge all the claims. The truth is, that the doctrine was introduced originally upon very unsatisfactory grounds; and it now stands more upon authority than upon principle. And a strong disposition has been manifested in modern times not to enlarge the sphere of its operation; but to lay hold of any circumstances to establish exceptions to it (*g*). We shall presently see that it is somewhat differently applied in cases of creditors, properly so called, from what it is in cases of portions and advancements to children; for, in the latter cases, the presumption of satisfaction is more readily entertained and acted upon more extensively than in the former.

§ 1102. It is obvious, from this description of the doctrine of satisfaction, that the presumption is not conclusive, but may be rebutted by other circumstances attending the will. If the benefit given to the donee, possessing the right or claim, is different *in specie* from that to which he is entitled (*h*), the presumption of its being given in satisfaction will not arise, unless there be an express declaration (*i*), or a clear inference from other parts of the will, that such is the intention of the testator. The presumption may be rebutted, not only by intrinsic evidence, thus derived from the terms of the will itself, but it may also be rebutted or confirmed by extrinsic evidence, as by declarations of the testator touching the subject, or by written papers, explaining or confirming the intention (*k*).

§ 1103. Thus, for example, land given by a will is not deemed to be given in satisfaction of money due to the devisee; and money given by a will is not deemed to be given in satisfaction of an interest of the legatee in land; unless there is something more in the will explanatory of the intention of the testator. Accordingly, it was laid down by Lord Hardwicke, in respect to the doctrine of satisfaction, that, when a bequest is taken to be by way of satisfaction for money already due to the donee, the thing given in satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given; and that land is not to be taken in satisfaction for money, or money for land (*l*); or land of one tenure for land of another tenure (*m*).

(*g*) *Clarke v. Sewell*, 3 Atk. 97; *Sowden v. Sowden*, 1 Cox, 165; *Lady Thynne v. Earl of Glengall*, 2 H. L. C. 131.

(*h*) *Chaplin v. Chaplin*, 3 P. Wms. 245; *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211, s.c. nom. *Lechmere v. Lady Lechmere*, Cas. t. Talb. 80; *Alleyn v. Alleyn*, 2 Ves. Sen. 37.

(*i*) See *Prime v. Stebbing*, 2 Ves. Sen. 409.

(*k*) *Kirk v. Eddowes*, 3 Hare, 509; *Powys v. Mansfield*, 3 M. & C. 359; *In re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482; *In re Scott, Langton v. Scott*, [1903] 1 Ch. 1. See *In re Shields, Corbould-Ellis v. Dales*, [1912] 1 Ch. 591.

(*l*) *Bellasis v. Uthwatt*, 1 Atk. 426, 427; *Chaplin v. Chaplin*, 3 P. Will. 247; *Alleyn v. Alleyn*, 2 Ves. Sen. 37.

(*m*) *Pinnell v. Hallett*, Ambler, 106.

§ 1104. In regard also to cases, where the thing given is *ejusdem generis* with that due to the donee, the presumption that it is given in satisfaction, does not necessarily arise; nor is it, as has been already intimated, universally conclusive. To make the presumption of satisfaction hold in any such cases, it is necessary that the thing substituted should not be less beneficial, either in amount, or certainty, or value, or time of enjoyment, or otherwise, than the thing due or contracted for (n). The notion of satisfaction implies the doing or giving of something equivalent to the right extinguished. And it would be a very unjustifiable course to arraign the justice of the testator, by presuming that he meant to ask a favour, instead of performing a duty.

§ 1105. But where the thing substituted is *ejusdem generis*, is of equal or of greater value, and much more beneficial to the donee, than his own claim; there the presumption of an intended satisfaction is generally allowed to prevail. Whether the presumption of an intended satisfaction, *pro tanto*, ought to be made in any case, where the things are *ejusdem generis*, but less than the claim of the donee, is a matter upon which some diversity of opinion once existed; but the current of modern authority has established the presumption beyond dispute (o).

§ 1106. The learned author had in common with equally eminent equity practitioners failed to observe strictly the distinction between satisfaction properly so called and cases of the performance of agreements and covenants, as the cases he cites show, nor is the confusion always absent at the present day. The best exposition, subject to one correction, of the distinction is contained in the judgment of Sir Thomas Plumer (p). "An important distinction exists between satisfaction and performance. Satisfaction supposed intention; it is something different from the subject of the contract, and substituted for it; and the question always arises, was the thing done intended as a substitute for the thing covenanted? a question entirely of intent: but with reference to performance, the question is, Has that identical act which the party contracted to do been done?" The passage should be qualified, as a substantial compliance with the terms of the contract is sufficient (q). Some cases, which have actually passed into judgment, may illustrate this distinction. Thus, where A. on his marriage, by articles, covenanted to leave his wife B., if she should survive him, £620; and that his executor should pay it in three months after his decease; and A. died intestate, and without issue, whereby his wife (who survived him) became entitled to a moiety of his personal estate, which was more than the £620; the question arose, whether the distributive

(n) *Blandy v. Widmore*, 1 P. Will. 324, Mr. Cox's note (1); *Lechmere v. Earl of Carlisle*, 3 P. Will. 211; *Lechmere v. Lady Lechmere*, Cas. t. Talb. 80.

(o) *Lady Thynne v. Earl of Glengall*, 2 H. L. C. 131; *Atkinson v. Littlewood*, L. R. 18 Eq. 593; *In re Blundell*, *Blundell v. Blundell*, [1906] 2 Ch. 222.

(p) *Goldsmid v. Goldsmid*, 1 Swanst. 211, 219.

(q) *Garthshore v. Chalie*, 10 Ves. 1; *Bengough v. Walker*, 15 Ves. 507.

share of B. should be deemed a satisfaction, or rather a due performance, of the covenant; for the covenant was not broken, the wife being administratrix. And it was held to be a due performance, although it is called in the report a satisfaction (*r*). So, where A. covenanted, by marriage articles, that his executors should, in three months after his decease, pay his wife £3,000; and by his will he gave all his property to his executors, in trust, to divide it in such ways, shares, and proportions as to them should appear right. The trust failed, whereby his estate became divisible according to the Statute of Distributions; and his wife survived him. It was held, that her distributive share, being greater than £3,000, was a satisfaction of the covenant (*s*).

§ 1107. The ground of each of these decisions seems to have been that there was no breach of the covenant; and as the widow, by mere operation of law, through the Statute of Distributions, received from her husband a larger sum than he had covenanted to pay her, it ought to be held a full performance of his covenant. These decisions do not seem to stand on a very firm foundation, as illustrations of the doctrine of satisfaction; for (as has been well observed) considerable doubt might have been entertained, whether of two claims so distinct, the satisfaction of one ought to be considered as a satisfaction of the other. But courts of equity would now hardly deem it fit to re-examine, and upon principle to discuss the point thus settled by them, which has been at rest for more than two centuries (*t*).

§ 1108. And here it may be remarked, that the doctrine of satisfaction, and also of performance of covenants, arising from bequests in wills, was well known in the civil law (*u*); and it was probably derived from that source with some variations into our jurisprudence. Thus, in the Digest, a case is put of a father, covenanting on his daughter's marriage to give her a certain sum, as a dotal portion, and afterwards leaving a legacy to her to the same amount; and it was there held that it amounted to a satisfaction of the portion (*x*). And other cases are there put of a like nature, where parol evidence was held admissible to establish the intention of satisfaction (*y*).

§ 1109. Questions of satisfaction usually come before courts of equity in three classes of cases: (1) in cases of portions secured by a marriage settlement; (2) in cases of portions given by will and an advancement to the donee afterwards in the life of the testator; (3) in cases of legacies to creditors. It may be convenient as well as proper, in our brief survey of this subject, to examine the doctrine separately in respect to each of these classes; as the application of it is not, or

(*r*) *Blandy v. Widmore*, 1 P. Will. 324, and Mr. Cox's note (1).

(*s*) *Goldsmid v. Goldsmid*, 1 Swanst. 211.

(*t*) See *per* Cozens-Hardy, M.R., *In re Roby, Howlett v. Newington*, [1908] 1 Ch.

71, 74.

(*u*) See *post*, § 1114.

(*x*) Dig. Lib. 30, tit. 1, f. 84, § 6.

(*y*) Dig. Lib. 30, tit. 1, f. 123.

at least may not be, precisely the same throughout in all of them (z). The first class may be illustrated by stating the case where a portion or provision is secured to a child by marriage settlement, or otherwise; and the parent or person standing *in loco parentis*, afterwards by will gives the same child a legacy, or share of residue, without expressly directing it to be in satisfaction of such portion or provision. In such a case, if the gift be of a sum as great as, or greater than, the portion or provision; if it be *ejusdem generis*; if it be equally certain with the latter, and subject to no contingency, not applicable to both; and if it be shown that it is not given for a different purpose; then it will be deemed a satisfaction in full or *pro tanto* (a).

§ 1110. We have already had occasion to intimate the doubts, which may be justly entertained, as to the correctness of the reasoning, by which courts of equity have been led to these results. As an original question, at least where the assets are sufficient to satisfy the portion, as well as the legacy, the natural presumption would be, that the testator intended the latter as a bounty, in addition to the duty already contracted for; a bounty fit for a parent to bestow, and far more reputable to his sense of moral and religious obligation, than a mere dry performance of his positive contract, recognized by law, and resting on a valuable consideration. But here as well as in many other cases, we must be content to declare, *Ita lex scripta est*;—It is established, although it may not be entirely approved. Even a small variance in the time of payment, or other trifling differences, where the value is substantially the same, will not vary the application of the rule, as the present inclination of courts of equity is against raising double portions (b). Being based upon the equitable presumption against double portions, it is displaced where one legatee is a stranger (c).

§ 1111. The second class may be illustrated by reference to the case, where a parent or other person *in loco parentis*, bequeaths a legacy or share of residue to a child or grandchild, and afterwards in his lifetime, gives a portion, or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy. In such a case, the portion so received, or the provision so made, on marriage or otherwise (if it be certain, and not merely contingent, if no other distinct object be pointed out, and if it be *ejusdem generis*), will be deemed a satisfaction in whole or in part of the testamentary gift, or, as it is sometimes

(z) See *Hinchcliffe v. Hinchcliffe*, 3 Ves. 527, where Lord Alvanley intimated that there might be a difference between cases of portions by settlement, and cases of legacies by will, as to subsequent advancements.

(a) *Lady Thynne v. Earl of Glengall*, 2 H. L. C. 131; *Atkinson v. Littlewood*, L. R. 18 Eq. 593; *In re Tussaud, Tussaud v. Tussaud*, 9 Ch. D. 363; *Montague v. Earl of Sandwich*, 32 Ch. D. 525; *In re Blundell, Blundell v. Blundell*, [1906] 2 Ch. 222.

(b) *Lady Thynne v. Earl of Glengall*, 2 H. L. C. 131.

(c) *In re Heather, Pumfrey v. Fryer*, [1906] 2 Ch. 230.

expressed, it will be held an ademption of the legacy (*d*). The expression *in loco parentis* in this connection has been defined by Lord Cottenham, L.C., in the following words: "No doubt the authorities leave, in some obscurity, the question what is meant by the expression, universally adopted of one *in loco parentis*" (*e*). Lord Eldon, however, in *Ex parte Pye*, has given to it a definition which I readily adopt, not only because it proceeds from his high authority, but because it seems to me to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says (*f*) it is a person "meaning to put himself *in loco parentis*, in the situation of the person described as the lawful father of the child"; but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices and duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child." A brother may place himself *in loco parentis* to his brother (*g*). And the artificial relationship may exist apart from ties of blood (*h*). The parental duty of providing for a child exists apart from minority (*i*).

§ 1112. The ground of this doctrine seems to be, that every such legacy is to be presumed as intended by the testator to be a portion for the child or grandchild, whether called so or not; and that, afterwards, if he advances the same sum upon the child's marriage, or on any other occasion, he does it to accomplish his original object, as a portion; and that, under such circumstances, it ought to be deemed an intended satisfaction or ademption of the legacy, rather than an intended double portion. And, where the sum advanced is less than the legacy, still it may fairly be presumed, that the testator, having acted merely in the discharge of a moral obligation, may, from a change of his own views, or of his own circumstances, be satisfied that the portion ought to be less (*k*).

§ 1113. Now, to say the least of it, this is extremely artificial reasoning, and such as an ingenuous mind may find it difficult to follow. Lord Eldon has so characterized it. After admitting it to be

(*d*) *Pym v. Lockyer*, 5 M. & Cr. 20; *Agnew v. Pope*, 1 De G. & J. 49; *Montefiore v. Guedalla*, 1 De G. F. & J. 93; *Leighton v. Leighton*, L. R. 18 Eq. 459; *In re Pollock*, *Pollock v. Worrall*, 28 Ch. D. 552.

(*e*) See *Powys v. Mansfield*, 3 M. & Cr. 359, 366, 367.

(*f*) 18 Ves. 140, 154.

(*g*) *Monck v. Lord Monck*, 1 Ball & B. 298.

(*h*) *In re Pollock*, *Pollock v. Pollock*, 28 Ch. D. 552.

(*i*) *Booker v. Allen*, 2 Russ. & M. 270; *In re Lacon*, *Lacon v. Lacon*, [1891] 2 Ch. 482.

(*k*) *Pym v. Lockyer*, 5 M. & Cr. 29; *Hopwood v. Hopwood*, 7 H. L. C. 728.

the unquestionable doctrine of the court, that, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving it as a portion, he has strongly remarked: "And, by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling, upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part. And, in some cases, it has gone a length consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances, upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and although, at the time of making the will, he thought he could not discharge that debt with less than £10,000, yet by a change of his circumstances and of his sentiments upon moral obligation, it may be satisfied by the advance of a portion of £5,000" (l). In addition to this strong language, it may be added, that courts of equity make out this sort of doctrine, not upon any clear intention of the testator anywhere expressed by him, but they first create the intention, and then make the parent suggest all the morals and equities of the case, upon their own artificial modes of reasoning, of which it is not too much to say, that scarcely any testator could ever have dreamed (m).

§ 1114. It has been supposed, that the origin of this particular doctrine is to be found in the civil law, and that it was transferred from hence into the equity jurisprudence of England (n). But Lord Thurlow has expressed a doubt, whether the doctrine of the civil law proceeds so far, and whether it is there taken up on the idea of a debt, or is not rather considered as a presumption, repellable by evidence (o). The language attributed to his lordship on this occasion seems not exactly to express his true meaning; for, in the equity jurisprudence of England also, the presumption may be rebutted by evidence, as the same judge pointed out in a subsequent case (p). His meaning probably was, that the matter was a mere matter of presumption, arising from the whole circumstances of the will; and that there was no such rule in the civil law as that, in English jurisprudence, namely, that, *prima facie*, such a portion, subsequently given, was an ademption of the legacy. No one can doubt that, in many cases, such a presumption may arise from the circumstances. As, for example, in a case put in the civil law. A

(l) *Ex parte Pye* and *Ex parte Dubost*, 18 Ves. 151.

(m) *Grave v. Earl of Salisbury*, 1 Bro. C. C. 425.

(n) See *ante*, § 1108.

(o) *Grave v. Earl of Salisbury*, 1 Bro. C. C. 425, 427.

(p) *Debeze v. Mann*, 1 Cox, 346, s.c. 2 Bro. C. C. 165, 519. See also *In re Scott, Langton v. Scott*, [1903] 1 Ch. 1.

father by his will devised certain lands to his daughter, and afterwards gave the same lands to her as a marriage portion. It was held to be an ademption of the devise. “*Filia legatorum non habet actionem, si ea, quæ ei in testamento reliquit, vivus pater postea in dotem dederit*” (q). So, it was held in the same law, to be a revocation of the legacy of a debt, if it was afterwards collected of the debtor by the testator in his lifetime. The like rule was applied, where, after the devise of specific property, the testator alienated in his lifetime. “*Testator supervivens, si eam rem, quam reliquerat, vendiderit, extinguitur fideicommissum.*” These cases are so obvious, as necessary and intentional ademption of the legacies, that they require no artificial rules of interpretation to expound the intent. And yet the civil law was so far from favouring ademptions, that, even in these cases, it admitted proof that the testator did not intend to adeem the legacy; the rule being, “*Si rem suam legaverit testator, posteaque eam alienaverit; si non adimendi animo vendidit, nihilominus deberi*” (r). And again: “*Si rem suam testator legaverit eamque necessitate urgente alienaverit, fideicommissum peti posse, nisi probetur, adimere ei testatorem voluisse. Probationem autem mutatæ voluntatis ab hæredibus exigendam*” (s). These cases are sufficient to show how widely variant the doctrine on this subject is in the civil law from that which now prevails in equity.

§ 1115. There are, however, in equity jurisprudence, certain established exceptions to this doctrine of constructive satisfaction, or ademption of legacies, which deserve particular notice. In the first place, at one time it was thought not to apply to the case of a devisee of a mere residue; for it was said, that a residue is always changing. It might amount to something or be nothing; and therefore no fair presumption could arise of its being an intended satisfaction or ademption. This opinion was shaken in *Lady Thynne v. Earl of Glengall* (t), in which it was held, after a full review of all the authorities, that the bequest of a residue will, according to its amount, be a satisfaction of a portion, either in full, or *pro tanto*, and the earlier cases to the contrary were not approved. But in *Montefiore v. Guedalla* (u) the question was again considered and the decisions reviewed, and the rule declared to be one of intention, whether, and how far, a residue shall be taken as adeemed by subsequent portions given, or settled, and that it should not depend upon the mere uncertainty of the residue, or upon slight differences between the trusts and the residue, and the trusts of the settlement. The same rule is applied to all questions of ademption.

§ 1116. Another exception to this doctrine of constructive ademption of legacies may be gathered from the qualification already annexed

(q) Cod. Lib. 6, tit. 37, l. 11.

(r) Inst. Lib. 2, tit. 20, § 12; *ibid.* § § 10, 11.

(s) Dig. Lib. 32, tit. 3, f. 11, § 12; Pothier, Pand. Lib. 34, tit. 4, n. 8.

(t) 2 H. L. C. 131.

(u) 1 De G. F. & J. 93.

to the enunciation of it in the preceding pages. It is there limited to the case of a parent, or of a person standing *in loco parentis*. In relation to parents, it is applicable only to legitimate children; and in relation to persons standing *in loco parentis*, it is also applicable generally to legitimate children only, unless the party has voluntarily placed himself *in loco parentis* to a legatee, not standing either naturally or judicially in that predicament. All other persons are, in contemplation of law, treated as strangers to the testator (x).

§ 1117. But this doctrine of the constructive ademption of legacies has never been applied to legacies to mere strangers, unless under very peculiar circumstances, such as where the legacy is given for a particular purpose, and a gift is afterwards, in the lifetime of the party, made exactly for the same purpose, and for none other (y). Except in cases standing upon such peculiar circumstances, and which, therefore, seem to present a very cogent presumption of an intentional ademption, the rule prevails, that a legacy to a stranger, legitimate or illegitimate, is not adeemed by a subsequent portion or advancement in the lifetime of the testator, without some expression of such intent manifested in the instrument, or by some writing accompanying the portion or advancement and charging the conscience of the beneficiary (z).

§ 1118. The reason commonly assigned for this doctrine is, that, as there is no such obligation upon such a testator to provide for the legatee, as subsists between a parent and child, no inference can arise, that the testator intended, by the subsequent gift or advancement, to perform any such duty *in præsenti*, instead of performing it at his death; and there is no reason why a person may not be entitled to as many gifts as another may choose to bestow upon him. That this reasoning is extremely unsatisfactory, as well as artificial, may be unhesitatingly pronounced. It leads to this extraordinary conclusion, that a testator, in intendment of law, means to be more bountiful to strangers than to his own children; that, by a legacy to his children, he means not to gratify his feelings or affections, but merely to perform his duty; but that, by a legacy to strangers, he means to gratify his feelings, affections, or caprices, without the slightest reference to his duty. What makes the doctrine still more difficult to be supported upon any general reasoning is, that grandchildren, brothers, sisters, uncles, aunts, nephews, and nieces, as well as natural children, are deemed strangers to the testator in the sense of the rule (unless he has placed himself towards them *in loco parentis*); and that they are in a better condition, not only than legitimate children, but even than they would be if the testator formally

(x) *Suisse v. Lord Lowther*, 2 Hare, 424; affirmed 12 L. J. Ch. 315. See *ante*, § 1111.

(y) *Suisse v. Lord Lowther*, 2 Hare, 424, affirmed 12 L. J. Ch. 315; *Pankhurst v. Howell*, L. R. 6 Ch. 136; *In re Pollock*, *Pollock v. Worrall*, 28 Ch. D. 552.

(z) *In re Shields*, *Corbould Ellis v. Dales*, [1912] 1 Ch. 591.

acted *in loco parentis*. Considerations and consequences like these may well induce us to pause upon the original propriety of the doctrine. It is, however, so generally established, that it cannot be shaken, but by overthrowing a mass of authority, which no judge would feel himself at liberty to disregard (*a*).

§ 1119. The third and last class of cases to which we have alluded as connected with the doctrine of satisfaction, is, where a legacy is given to a creditor. And here, the general rule is, that where the legacy is equal to, or greater in amount than an existing debt, where it is of the same nature; where it is certain, and not contingent; and where no particular motive is assigned for the gift; in all such cases the legacy is deemed a satisfaction of the debt (*b*). The ground of this doctrine is, that a testator shall be presumed to be just before he is kind or generous. And, therefore, although a legacy is generally to be taken as a gift, yet, when it is to a creditor, it ought to be deemed to be an act of justice, and not of bounty in the absence of all counter-vailing circumstances, according to the maxim of the civil law, “*Debitor non præsumitur donare*.”

§ 1120. Some of the observations which have been already made, apply, although with diminished force, to this class of cases. For, where a man has assets, sufficient both for justice and generosity, and where the language of the instrument imports a donation, and not a payment, it seems difficult to say why the ordinary meaning of the words should not prevail. Where the sum is precisely the same with the debt, it may be admitted, that there arises some presumption, and, under many circumstances, it may be a cogent presumption of an intention to pay the debt. But, where the legacy is greater than the debt, the same force of presumption certainly does not exist; and, if it is less than the debt, then (as we shall presently see) the presumption is admitted to be gone.

§ 1121. It is highly probable that this doctrine was derived from the civil law, where it is clearly laid down, but with limitations and qualifications in some respects different from those which are recognized in equity jurisprudence (*c*). Where the debt was absolutely due, and for the same precise sum, a legacy to the same amount was

(*a*) Lindley, L.J., *In re Lacon*, *Lacon v. Lacon*, [1891] 2 Ch. 482, 490; *In re Roby*, *Howlett v. Newington*, [1908] 1 Ch. 71. Questions of another nature often arise, as to what constitutes an advancement of a child, within the meaning of that term in section 5 of Statute of Distributions (22 & 23 Chas. II. ch. 10). The principal cases on the subject will be found collected in 1 Mad. Pr. Ch. 507, 516. See *Taylor v. Taylor*, L. R. 20 Eq. 155, where the subject of advancement was elaborately discussed by Sir G. Jessel, M.R., who held that an “advancement by portion” within the meaning of the statute is a sum given by a parent to establish a child in life or to make a provision for a child. See also *Edwards v. Freeman*, 2 P. Will 436; *Boyd v. Boyd*, L. R. 4 Eq. 305; *Leighton v. Leighton*, L. R. 18 Eq. 458; and *Hatfield v. Minet*, 8 Ch. D. 136; *In re Blockley*, *Blockley v. Blockley*, 29 Ch. D. 258.

(*b*) *Talbott v. Duke of Shrewsbury*, Prec. Ch. 394.

(*c*) Pothier, Pand. Lib. 34, tit. 3, nn. 30 to 34.

deemed a satisfaction of it. But, if there was a difference even in the time of payment, between the debt and the legacy, the latter was not a satisfaction. “*Sin autem, neque modo, neque tempore, neque conditione, neque loco, debitum, differatur, inutile est legatum*” (d). And so, if the legacy was more than the debt, it seems that it was not a satisfaction. “*Quotiens debitor creditori suo legaret, ita inutile esse legatum, si nihil interesset creditoris ex testamento potius agere, quam ex pristina obligatione*” (e).

§ 1122. But, although the rule, as to a legacy being an ademption of a debt, is now well established in equity, yet it is deemed to have so little of a solid foundation, either in general reasoning, or as a just interpretation of the intention of the testator, that slight circumstances have been laid hold of to escape from it, and to create exceptions to it (f). The rule, therefore, is not allowed to prevail, where the legacy is of less amount than the debt, even as a satisfaction *pro tanto*; nor where there is a difference in the times of payment of the debt and of the legacy; nor where they are of a different nature as to the subject-matter or as to the interest therein; nor where a particular motive is assigned for the gift; nor where the debt is contracted subsequently to the will; nor where the legacy is contingent or uncertain; nor where there is an express direction in the will for the payment of debts (g); nor where the bequest is of a residue (h); nor where the debt is a negotiable security (i); nor where the legacy is given to the creditor's wife (k); nor where the debt is upon an open and running account (l). And as to a debt, strictly so called, there is no difference, whether it is a debt due to a stranger or to a child (m).

§ 1123. On the other hand, where a creditor leaves a legacy to his debtor, and either takes no notice of the debt, or leaves his intention doubtful, courts of equity will not deem the legacy as either necessarily *prima facie* evidence of an intention to release or extinguish the debt; but they will require some evidence, either on the face of the will, or *aliunde* to establish such an intention (n).

(d) Dig. Lib. 30 (Lib. prim. de Leg.), tit. 1, f. 29; Inst. Lib. 2, tit. 20, § 14.

(e) Pothier, Pand. Lib. 34, tit. 3, n. 33.

(f) See *In re Horlock, Calham v. Smith*, [1895] 1 Ch. 516.

(g) *Talbot v. Duke of Shrewsbury*, Prec. Ch. 394; *Chauncey's Case*, 1 P. Wms. 408; *Rowe v. Rowe*, 2 De G. & Sm. 294; *In re Huish, Bradshaw v. Huish*, 43 Ch. D. 260; *In re Horlock, Calham v. Smith*, [1895] 1 Ch. 516.

(h) *Barrett v. Beckford*, 1 Ves. Sen. 519; *Devese v. Pontet*, 1 Cox, 188; s.c. Prec. Ch. by Finch, 240, note.

(i) *Carr v. Eastabrooke*, 3 Ves. 564.

(k) *Hall v. Hill*, 1 Dru. & War. 94.

(l) *Rawlins v. Powell*, 1 P. Will. 299.

(m) *Tolson v. Collins*, 4 Ves. 483. The principal cases on this subject will be found collected in 2 Roper on Legacies, by White, ch. 17, pp. 28 to 67; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (l); *Goodfellow v. Burchett*, 2 Vern. 298, Mr. Raithby's note; *Chancey's Case*, 1 P. Will. 410, Mr. Cox's note; 2 Mad. Pr. Ch. 33 to 49.

(n) *Courtenay v. Williams*, 3 Hare, 539; affirmed 15 L. J. Ch. 204.

§ 1123a. Closely allied to the subject of election and satisfaction in cases of legacies, is the doctrine as to what is called the cumulation of legacies, or when and under what circumstances legacies given by different instruments or wills are to be deemed cumulative or not. The general rule here is, that where legacies are given by different instruments, whether will and codicil or successive codicils, the presumption is, *primâ facie*, that two legacies are intended, and that the last is not a mere repetition of the former; nor will the fact that each legacy is for the same amount in money operate to repel the presumption that they are cumulative, there must be other circumstances to repel it (o). As, for example, if the testator connects a motive with both, and that motive is the same, the double coincidence will induce the courts to believe that repetition and not accumulation is intended. *A fortiori*, where each instrument gives precisely the same thing, as a horse, or a coach, or a particular diamond ring: or the language shows by express declaration or natural implication, that the testator intends a mere repetition, the presumption of accumulation is completely repelled (p).

(o) *Hooley v. Hatton*, 1 Bro. C. C. 390 n.; *Russell v. Dickson*, 4 H. L. C. 293; *Wilson v. O'Leary*, L. R. 7 Ch. 448; *Hubbard v. Alexander*, 3 Ch. D. 738.

(p) *Hooley v. Hatton*, 1 Bro. C. C. 390 n.; *Heming v. Clutterbuck*, 1 Bligh. N. S. 479; *Suisse v. Lord Lowther*, 2 Hare, 424, 432; affirmed 12 L. J. Ch. 315.

CHAPTER XXX.

APPLICATION OF PURCHASE-MONEY.

§ 1124. IN this chapter the learned author discussed a question formerly of great importance, how far a receipt of the trustee exercising a power of sale operated as a complete discharge or whether the purchaser was bound to look to the due APPLICATION OF PURCHASE-MONEY. This subject, therefore, although it may equally apply to other cases of trusts, created *inter vivos*, may be conveniently treated in this place. The doctrine was hotly assailed by many eminent persons, and its inconveniences pointed out, the most glaring arising in cases of infancy, where the parties in interest are incapable of giving a valid assent to the receipt and application of the purchase-money by the trustee (a). The principle was intelligible enough and also sound equity. The purchaser acquired the land with notice that it was burdened with a charge, for there was no personal remedy against him, and this land belonged to the beneficiary claiming under the will or settlement burdened only with the charge (b). The question that had to be determined was whether there existed an overriding power of disposition displacing the title of the beneficiary.

§ 1125. The doctrine was not universally true, that a purchaser, having notice of a trust, was bound to see that the trust was in all cases properly executed by the trustee. As applied to the cases of sales, authorized to be made by trustees for particular purposes (which is the subject of our present enquiries), the doctrine was not absolute, that the purchaser was bound to see that the money raised by the sale was applied to the very purposes indicated by the trust. On the contrary, there were many qualifications and limitations of the doctrine in its actual application to sales both of personal and of real estate.

§ 1126. The best method of ascertaining the true nature and extent of these qualifications and limitations will be by a separate consideration of them, as applied to each kind of estate, since the rules which govern them are, in some respects, dissimilar, owing to the greater power which a testator has over his real, than he has

(a) Mr. Butler's note to Co. Litt. 290b, note (1), § 12; in *Balfour v. Welland*, 16 Ves. 156, Sir William Grant expressed his dissatisfaction with the doctrine. See also Sugden, *Vendors and Purchasers*, 9th ed., vol. 2, ch. 11, pp. 30 to 56.

(b) *Davis* (or *Davies*) v. *Spurling*, 1 Russ. & M. 64; s.c. Tambl. 199.

over his personal estate. In regard to real estate, it is well known that, at the common law, it was not bound, even for the specialty debts of the testator, except in the hands of his heir if specially bound; although, by 3 W. & M. ch. 14, it was made liable for such debts in the hands of his devisee. But, as to simple contract debts, until 1833, the real estate of deceased persons was not liable generally for the payment of any such debts. The statute of 3 & 4 William IV. c. 104, had made all such real estate liable, as assets in equity, for the payment of all debts, whether due on simple contract or by specialty. But, as to personal estate, it was at the common law, and still remains, directly liable to the payment of all debts; or as it is commonly expressed, it goes to the executors, as assets for creditors, to be applied in a due course of administration. It is, therefore, in a strict sense, a trust fund for the payment of debts generally (c). We shall presently see, how this consideration bears upon the topic now under discussion.

§ 1127. The general principle of courts of equity in regard to the duty of purchasers (not especially exempted by any provision of the author of the trust), in cases of sales of property, or charges on property under trusts (for there is no difference, in point of law, between sales and charges), to see to the application of the purchase-money, was this: that, wherever the trust or charge was of a defined and limited nature, the purchaser must himself have seen that the purchase-money was applied to the proper discharge of the trust; but, wherever the trust was of a general and unlimited nature, he need not have seen to it. Thus, for example, if a trust were created to sell for the payment of a portion, or of a mortgage, there, the purchaser must have seen to the application of the purchase-money to that specified object. If, on the other hand, a trust were created, a devise made, or a charge established, by a party for the payment of debts generally, the purchaser was exempted from any such obligation (d).

§ 1128. Let us, in the first place, consider the doctrine, in its application to personal estate, including therein leasehold estates, which are, equally with personal chattels, subject to the payment of debts. As the personal estate was liable for the payment of the debts of the testator generally, the purchaser of the whole, or any part of it, never was, upon the principle already stated, bound to see that the purchase-money was applied by the executor to the discharge of the debts (e); for the trust was general and unlimited, it being for the payment of all debts. It is true, that there was an apparent exception to the rule; and that is, that he must have been a *bond fide* purchaser, without notice, that there were no debts; and he

(c) *Elliot v. Merriman*, Barnard, ch. 78.

(d) *Elliot v. Merryman*, Barnard, ch. 78; *Braithwaite v. Britain*, 1 Keen, 206.

(e) *Elliot v. Merryman*, Barnard, ch. 78.

must not have colluded with the executor in any wilful misapplication of the assets (f). But this proceeded upon the ground of fraud, which is of itself sufficient to vacate any transaction whatsoever.

§ 1129. It made no difference in the application of this general doctrine as to the personal estate, that the testator had directed his real estate to be sold for the payment of his debts, whether he specified the debts or not; or that he had made a specific bequest of a part of his personal estate for a particular purpose, or to a particular person, although such specific bequest were known to the purchaser, if he had no reason to suspect any fraudulent purpose (g). The ground of this doctrine was, that, otherwise, it would have been indispensable for a person, before he could become the purchaser of any personal estate, specifically bequeathed, to come into a court of equity to have an account taken of the assets of the testator, and of the debts due from him, and in order to ascertain whether it was necessary for the executor to sell; which would be a most serious inconvenience, and greatly retard the due settlement of estates (h).

§ 1130. In the next place, in regard to real estate. Where there was a devise of real estate for the payment of debts generally, or the testator charged his debts generally upon his real estate, and the money was raised by the trustee by sale or mortgage, the same rule applied as in cases of personalty, that the purchaser or mortgagee was not bound to look to the application of the purchase-money; and for the same reason, namely, the unlimited and general nature of the trust, and the difficulty of seeing to the application of the purchase or mortgage money, without an account of all the debts and assets under the superintendence of courts of equity (i).

§ 1131. In the case of sales of real estate for the payment of debts generally, the purchaser was not only not bound to look to the application of the purchase-money; but, if more of the estate were sold than was sufficient for the purposes of the trust, it would not be to his prejudice. Nor would it make any difference, in cases of this sort, whether the testator charged both his personal and real estate with payment of his debts, or the real only; for, ordinarily the personal estate, unless specially exempted, is the primary fund; and, if exempted, still the charge on the real estate was general and unlimited. Nor would it make any difference, whether the devise directed the sale of the real estate for the payment of debts, or only charges the real estate therewith. Nor would it make any difference, that the trust was only to sell, or was a charge for so much as the personal estate is deficient to pay the debts. Nor would it make any

(f) *Hill v. Simpson*, 7 Ves. 152; *Watkins v. Cheek*, 2 Sim. & St. 199.

(g) *Hill v. Simpson*, 7 Ves. 152; Co. Litt. 290 b, Butler's note (1), § 12.

(h) *Ewer v. Corbet*, 2 P. Will. 148; *Langley v. Earl of Oxford*, Ambler, 17.

(i) *Elliot v. Merryman*, Barnard, ch. 78; *Robinson v. Lowater*, 5 De G. M. & G.

difference, that a specific part of the real estate was devised for a particular purpose or trust, if the whole real estate were charged with the payment of debts generally by the will (*k*). If, however, the trustees had only a power to sell and not an estate devised to them, then, unless the personal estate were deficient, the power to sell did not arise (*l*).

§ 1132. But where in cases of real estate, the trust was for the payment of legacies, or of specified or scheduled debts, the rule was different; for they were ascertained; and the purchaser must have seen, and, in the view of the court of equity, he was bound to have seen, that the money was actually applied in discharge of them (*m*). On the other hand, cases occurred, where the devise was for the payment of debts generally, and also for the payment of legacies, and then the trust became a mixed one. In such a case, the purchaser was not bound to see to the application of the purchase-money; because to have held him liable to see the legacies paid, would, in fact, have involved him in the necessity of taking an account of all the debts and assets (*n*).

§ 1133. Where the time directed by the devise for a sale of the real estate had arrived, and the persons entitled to the money were infants, or were unborn; there, the purchaser was not bound to see to the application of the purchase-money, because he might otherwise have been implicated by a trust of long duration (*o*). But, if an estate were charged with a sum of money, payable to an infant at his majority; there, the purchaser was bound to see the money duly paid on his arrival at age; for the estate would remain chargeable with it in his hands (*p*).

§ 1134. Where the trusts were defined, and yet the money was not merely to be paid over to third persons, but was to be applied by the trustees to certain purposes, which required, on their part, time, deliberation, and discretion, it seems that the purchaser was not bound to see to the due application of the purchase-money; as, where it was to pay all debts which should be ascertained within eighteen months after the sale; or where the trustees were to lay out the money in the funds, or in the purchase of other lands upon certain trusts (*q*).

§ 1135. These are some of the most important and nice distinctions which had been adopted by courts of equity upon this intricate topic;

(*k*) Co. Litt. 290 b, Butler's note (1), § 12; *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 4 M. & Cr. 164; *Corser v. Cartwright*, L. R. 7 H. L. 731.

(*l*) *Shaw v. Borrer*, 1 Keen, 559.

(*m*) *Elliot v. Merryman*, Barnard, ch. 78; *Eland v. Eland*, 4 M. & Cr. 420; *Johnson v. Kennet*, 3 Myl. & K. 624.

(*n*) *Forbes v. Peacock*, 1 Ph. 717; *Corser v. Cartwright*, L. R. 7 H. L. 731.

(*o*) *Breedon v. Breedon*, 1 Russ. & M. 413; *Gillibrand v. Goold*, 5 Sim. 149.

(*p*) *Dickinson v. Dickinson*, 3 Bro. C. C. 19.

(*q*) *Balfour v. Welland*, 16 Ves. 151; *Locke v. Lomas*, 5 De G. & Sm. 326.

and they lead strongly to the conclusion, to which not only eminent jurists, but also eminent judges, have arrived, that it would have been far better to have held in all cases, that the party, having the right to sell, had also the right to receive the purchase-money without any further responsibility on the part of the purchaser, as to its application.

§ 1135a. The view taken in the text that the purchaser from a trustee ought not to be saddled with the responsibility of seeing that the purchase-money was properly applied, was adopted by the Legislature in 1860 by an enactment now embodied in section 20 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which provides that "the receipt in writing of any trustee for any money payable to him under any trust or power shall effectually exonerate the person paying the same from seeing to the application, or from being answerable for any loss or misapplication thereof." And by section 40 of the Settled Land Act, 1882, it is provided that the receipt in writing of the trustees of a settlement, or where one trustee is empowered to act of one trustee or of the personal representative or representatives of the last surviving or continuing trustee for any money or securities paid or transferred to the trustees, trustee, representatives, or representative as the case may be, effectually discharges the payer or transferor therefrom and from being bound to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of the Act or that no more than is wanted is raised.

CHAPTER XXXI.

CHARITIES.

§ 1136. It is in cases of wills also that we most usually find provisions for public CHARITIES; and to the consideration of this subject, constituting, as it does, a large and peculiar source of equity jurisdiction under the head of trusts, we shall now proceed.

§ 1137. It is highly probable that the rudiments of the law of charities were derived from the Roman or civil law (*a*). One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity was a permission to his subjects to bequeath their property to the Church (*b*). This permission was soon abused to so great a degree as to induce the Emperor Valentinian to enact a mortmain law, by which it was restrained (*c*). But this restraint was gradually relaxed; and in the time of Justinian it became a fixed maxim of Roman jurisprudence, that legacies to pious uses (which included all legacies destined for works of piety or charity, whether they related to spiritual or to temporal concerns) were entitled to peculiar favour, and to be deemed privileged testaments (*d*).

§ 1138. Thus, for example, a legacy of ornaments for a church, a legacy for the maintenance of a clergyman to instruct poor children, and a legacy for their sustenance, were esteemed legacies to pious and charitable uses (*e*). In all these cases the bequests had their

(*a*) In Lord Chief Justice Wilmot's notes of his opinions (pp. 53, 54), it is said: "Donations for public purposes were sustained in the civil law, and applied when illegal *cy-près* to other purposes, one hundred years before Christianity was the religion of the Empire." And for this is cited Dig. Lib. 33, tit. 2, De Usu et Usufruc. Legatorum, §§ 16, 17.

(*b*) Cod. Theodos. Lib. 16, tit. 2, l. 4.

(*c*) *Ibid.* l. 20. To those who may not be familiar with the term "mortmain," it may be proper to state that the statutes in England, which prohibit corporations from taking lands by devise, even for charities, except in certain special cases, are generally called the Statutes of Mortmain, *mortuâ manu*, for the reason of which appellation Sir Edward Coke offers many conjectures. But (says Mr. Justice Blackstone, 1 Black. Comm. 479), there is one which seems more probable than any that he has given us, namely, that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law; land, therefore, holden by them might, with great propriety, be said to be held *in mortuâ manu*. The word is now commonly employed to designate all prohibitory laws which limit, restrain, or annul gifts, grants, or devises of lands and other corporeal hereditaments to charitable uses. See, on this subject, 2 Black. Comm. 268 to 274.

(*d*) 2 Domat, Civil Law, B. 4, tit. 2, § 6.

(*e*) 2 Domat, B. 4, tit. 2, § 6.

charitable motives, independent of the consideration of the merit of the particular legatees. But other legacies, although not of a pious or charitable nature, but yet for objects of a public nature, or for a general benefit, were also deemed entitled to the like encouragement and protection. Thus, for example, a legacy destined for some public ornament, or for some public use, such as to build a gate for a city or for the embellishment and improvement of a public street or square, or as a prize to persons excelling in an art or science, was deemed a privileged legacy, and of complete validity (*f*). “*Si quid relictum sit civitatibus, omne valet, sive in distributionem relinquatur, sive in opus, sive in alimenta, vel in eruditionem puerorum, sive quid aliud*” (*g*). Again: “*Civitatibus legari potest etiam, quod ad honorem ornatumque civitatis pertinet. Ad ornatum; puta, quod instruendum forum, theatrum, stadium, legatum fuerit. Ad honorem; puta, quod ad munus edendum, venationemve, ludos scenicos, ludos Circenses, relictum fuerit; aut, quod ad divisionem singulorum civium vel epulam, relictum fuerit. Hoc amplius, quod in alimenta infirmæ ætatis (puta senioribus, vel pueris, puellisque), relictum fuerit; ad honorem civitatis pertinere respondetur*” (*h*).

§ 1139. The construction of testaments of this nature was most liberal; and the legacies were never permitted to be lost, either by the uncertainty or failure of the persons or objects for which they were destined. Hence, if a legacy was given to the church, or to the poor generally, without any description of what church, or what poor, the law sustained it, by giving it in the first case to the parish church of the place where the testator lived; and in the latter case to the hospital of the same place; and if there was none, then to the poor of the same parish (*i*). The same rule was applied where, instead of a bare legacy, the testator appointed as his heir, or devisee, or legatee, the church of the poor. It was construed to belong to the church, or the poor of the parish, where he resided (*k*). So, if a legacy were given to God (as seems sometimes to have been the usage in the time of Justinian), it was construed to be a legacy to the church of the parish where the testator resided (*l*).

§ 1140. If the testator himself had designated the person by whom the charity was to be carried into effect, he was compellable to perform it. If no person was designated, the bishop or ordinary of the place of the testator's nativity might compel its due execution (*m*). And in all cases where the objects were indefinite, the legacy was carried into effect under the direction of the judge who had cognizance

(*f*) *Ibid.*

(*g*) Dig. Lib. 30, tit. 1, f. 117.

(*h*) *Ibid.* f. 122.

(*i*) 2 Domat, B. 4, tit. 2, § 6, art. 1, p. 169; Ferriere, Dict. h. t.

(*k*) *Ibid.* art. 4, p. 169.

(*l*) *Ibid.*; Novellæ, 141, cap. 9.

(*m*) 2 Domat, B. 4, tit. 2, § 6, art. 5, 169; Cod. Lib. 1, tit. 3, l. 28, § 1.

of the subject (*n*). So, if a legacy was given for a definite object, which either was previously accomplished, or which failed, it was, nevertheless, held valid, and applied under judicial discretion to some other object (*o*). Thus, for example, if the testator had left a legacy for building a parish church, or an apartment in a hospital, and before his death the church or apartment had been built, or it was not necessary or useful, the legacy did not become a nullity, but it was applied by the proper functionary to some other purposes of piety or charity (*p*). And we shall presently see, that the like doctrine has been carried to a great extent in the jurisprudence of England on the same subject.

§ 1141. The high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce these principles of pious legacies into the common law of England; and the zeal and learning of the ecclesiastical tribunals must have been constantly exercised to enlarge their operation. Lord Thurlow (*q*) was clearly of opinion, that the doctrine of charities grew up from the civil law; and Lord Eldon (*r*), in assenting to that opinion, has judiciously remarked, that at an early period the ordinary had the power to apply a portion of every man's personal estate to charity, and when, afterwards, the statute compelled a distribution, it is not impossible that the same favour should have been extended to charity in wills, which, by their own force, purported to authorize such a distribution. Be the origin, however, what it may, it cannot be denied that many of the privileges attached to pious legacies have been for ages incorporated into the English law (*s*). Indeed, in former times, the construction of charitable bequests was pushed to the most alarming extravagance. And although it has been in a great measure checked in later and more enlightened times, there are still some anomalies in the law on this subject which are hardly reconcilable with any sound principles of judicial interpretation, or with any proper exercise of judicial authority.

§ 1142. The history of the law of charities, prior to the statute of the 43rd of Elizabeth, ch. 4, which is emphatically called the Statute of Charitable Uses (*t*), is extremely obscure. It may, nevertheless, be useful to endeavour to trace the general outline of that history, since it may materially assist us in ascertaining how far the present

(*n*) *Ibid.*; Swinburne, Pt. 1, § 16, p. 104.

(*o*) 2 Domat, B. 4, tit. 2, § 6, art. 6, p. 170.

(*p*) *Ibid.*

(*q*) *White v. White*, 1 Bro. C. C. 12.

(*r*) *Moggridge v. Thackwell*, 7 Ves. 36, 69; *Mills v. Farmer*, 1 Meriv. 55, 94, 95.

(*s*) Swinb. on Wills, Pt. 1, § 16, pp. 66 to 73.

(*t*) This statute has been repealed by the Mortmain and Charitable Uses Act, 1888, but it is expressly provided by section 13, sub-s. 2 of that statute that only those objects are to be deemed charitable which are so defined in the statute of Elizabeth.

authority and doctrines of the Court of Chancery, in regard to charitable uses, depend upon that statute; and how far they arise from its general jurisdiction, as a court of equity, to enforce trusts, and especially to enforce trusts to pious uses.

§ 1143. It is not easy to arrive at any satisfactory conclusion on this head. Until a comparatively recent period, and, indeed, until the report of the Commissioners on the Public Records, published by Parliament in 1827 (to which our attention will be more directly drawn hereafter), few traces could be found in the volumes of printed reports, or otherwise, of the exercise of this jurisdiction, in any shape, prior to the statute of Elizabeth. The principal, if not the only cases then to be found, were decided in the courts of common law, and generally turned upon the question, whether the uses were void or not, within the statutes against superstitious uses. One of the earliest cases is *Porter's Case* (*u*); which was a devise of lands, devisable by custom, to the testator's wife in fee, upon condition that she should assure the lands, devised for the maintenance and continuance of a free school, and certain almsmen and almswomen; and it appeared that the heir had entered for a condition broken, and conveyed the same lands to the queen. It was held, that the use, being for charity, was a good and lawful use, and not void by the statutes against superstitious uses; and that the queen might well hold the land for the charitable uses. Lord Loughborough, in commenting on this case, observed: "It does not appear, that this court (that is, chancery), at that period, had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere (*x*), as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now sitting (that is, an information to establish a charity); but they made out their case, as well as they could, by law" (*y*).

§ 1144. So, that the result of Lord Loughborough's researches on this point was that, until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities. It is remarkable, that Sir Thomas Egerton and Lord Coke, who argued *Porter's Case* for the queen, although they cited many antecedent cases, refer to none which were not decided at law. And the doctrine established by *Porter's Case* is, that if a feoffment is made to a general

(*u*) 1 Co. 22 b, in 34 & 35 Eliz. See also a like decision in *Partridge v. Walker*, cited 4 Co. 116 b; *Martidale v. Martin*, Co. Eliz. 288; Thetford School, 8 Co. 130.

(*x*) Sir Thomas Egerton was made Lord Chancellor in 39 Eliz. 1596, and was created Lord Ellesmere 1 James I. 1603.

(*y*) *Att.-Gen. v. Bowyer*, 3 Ves. 714, 726. In *Eyre v. Countess of Shaftesbury*, 2 P. Will. 119, Sir Joseph Jekyll, M.R., said: "In like manner, in case of charity, the king has, *pro bono publico*, an original right to superintend the case thereof; so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it as well as since, it has been every day's practice to file informations in chancery, in the attorney-general's name, for the establishment of charities." *Post*, § 1148; *Att.-Gen. v. Brereton*, Ves. 425, 427.

legal use, not superstitious, although indefinite, although no person is *in esse*, who could be the *cestui que use*, yet the feoffment is good; and if the use is bad, the heir of the feoffor will be entitled to enter, the legal estate remaining in him.

§ 1145. The absence, therefore, of all authority derived from any known antecedent equity decisions upon an occasion when they would probably have been used, if any existed, did certainly seem very much to favour the conclusion of Lord Loughborough. And in the absence of any such known antecedent decisions, it was not a rash conjecture, for it would be but a conjecture, that *Porter's Case*, having established that charitable uses, not superstitious, were good at law, the Court of Chancery, in analogy to the other cases of trusts, immediately afterwards held the feoffees to such uses accountable in equity for the due execution of them; and that the inconveniences felt in resorting to this new and anomalous proceeding, from the indefinite nature of some of the uses, gave rise, within a few years, to the statute of 43 Elizabeth, ch. 4 (z).

§ 1146. This view might also have some tendency to reconcile the language of Lord Loughborough with that of an opposite character, used upon other occasions by other chancellors and judges, in reference to the jurisdiction of chancery over charities (a), as it would show, that in cases of feoffments to charitable uses, bills to establish those uses might in fact have been introduced, or brought into familiar practice, by Lord Ellesmere, about five years before the statute of Elizabeth. This would be quite consistent with the fact that such bills were not sustained where the donation was to charity generally, and no trust estate was interposed, and no legal estate was devised, to support the uses. It is very certain, that, at law, devises to charitable uses generally, without interposing a trustee, and devises to a non-existing corporation, or to an unincorporated society, would have been, and in fact were, held utterly void for want of a person having a sufficient capacity to take as devisee (b). The statute of Elizabeth, in favour of charitable uses, cured this defect (c), and provided (as we shall hereafter have occasion more fully to consider) a new mode of enforcing such uses by a commission under the direction of the Court of Chancery.

§ 1147. Shortly after this statute, it became a matter of doubt, whether the Court of Chancery could grant relief by original bill in cases within that statute, or whether the remedy was not confined to the

(z) There was, in fact, an Act passed, respecting charitable uses, in 39 Eliz. ch. 9; but it was repealed by the Act of 43 Eliz. ch. 4. Com. Dig. *Charitable Uses*, N. 14.

(a) See *ante*, § 1143, note; *post*, § 1148.

(b) *Anon.*, 1 Ch. Cas. 207; *Att.-Gen. v. Tancred*, 1 W. Bl. 90; s.c. *Ambler*, 351; *Collison's Case*, Hob. 136; s.c. *Moore*, 888; *Widmore v. Woodruffe*, *Ambler*, 636, 640; Com. Dig. *Devise*, K.

(c) Com. Dig. *Charitable Uses*, N. 11; Com. Dig. *Chancery*, 2 N. 10.

proceeding by commission under the statute. That doubt remained until the reign of Charles II., when it was settled in favour of the jurisdiction of the court by original bill (*d*). On one occasion, when this very question was argued before him, Lord Keeper Bridgman declared, "That the king, as *pater patriæ*, may inform for any public benefit for charitable uses, before the statute of 30 [43] of Elizabeth for Charitable Uses. But it was doubted the court could not by bill take notice of that statute, so as to grant a relief according to that statute upon a bill" (*e*). On another occasion soon afterwards, where the devise was to a college, and was held void at law by the judges, for a misnomer, on a bill to establish the devise as a charity, the same question was argued; Lord Keeper Finch (afterwards Lord Nottingham) held the devise good, as an appointment under the statute of Elizabeth; and he "decreed the charity, though before the statute no such decree could have been made" (*f*). It would seem, therefore, to have been the opinion of Lord Nottingham, that an original bill would not, before the statute of Elizabeth, lie to establish a charity, where the estate did not pass at law to which the charitable uses attached.

§ 1148. On the other hand, the language of other judges leads to the conclusion that antecedent to the statute of Elizabeth, the Court of Chancery did, in virtue of its inherent authority, exercise a large jurisdiction in cases of charities. In *Eyre v. Shaftesbury* (*g*), Sir Joseph Jekyll said, in the course of his reasoning on another point: "In like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it as well as since, it has been every day's practice, to file informations in chancery, in the attorney-general's name, for the establishment of charities." In the *Corporation of Burford v. Lenthall* (*h*), Lord Hardwicke is reported to have said: "The courts have mixed the jurisdiction of bringing informations in the name of the attorney-general with the jurisdiction given them under the statute of Elizabeth, and proceed either way, according to their discretion."

§ 1149. In a subsequent case (*i*), which was an information filed by the attorney-general against the master and governors of a school, calling them to account in chancery, as having the general superintendency of all charitable donations, the same learned chancellor, in dis-

(*d*) *Att.-Gen. v. Newman*, 1 Ch. Cas. 157; s.c. 1 Lev. 284; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 119; *Att.-Gen. v. Brereton*, 2 Ves. 425, 427; *West v. Knight*, 1 Ch. Cas. 134; *Anon.*, 1 Ch. Cas. 267; 2 Fonbl. Eq. B. 3, pl. 2, ch. 1, § 1; *Parish of St. Dunstan v. Beauchamp*, 1 Ch. Cas. 193.

(*e*) *Att.-Gen. v. Newman*, 1 Ch. Cas. 157.

(*f*) *Anon.*, 1 Ch. Cas. 267.

(*g*) 2 P. Will. 103, 118. Cited also 7 Ves. Jun. 63, 87; and by Lord Justice Wilmot, in Wilmot's Notes of Cases, 24.

(*h*) 2 Atk. 550 (1743).

(*i*) *Att.-Gen. v. Middleton*, [1751] 2 Ves. Sen. 327.

cussing the general jurisdiction of the Court of Chancery on this head, and distinguishing the case before him from others, because the trustees or governors were invested with the visitatorial powers, said: "Consider the nature of the foundation. It is at the petition of two private persons, by charter of the Crown, which distinguishes this case from cases of the statute of Elizabeth on Charitable Uses, or cases before that statute in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the peculiar purposes therein, and no charter given by the Crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction; and that is from necessity; because there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate. But where there is a charter, with proper powers, there is no ground to come into this court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rules of law. Therefore, though I have often heard it said in this court, if an information is brought to establish a charity, and praying a particular relief and mode of regulation, and the party fails in that particular relief; yet that information is not to be dismissed, but there must be a decree for the establishment (*k*). That is always with this distinction, where it is a charity at large; or in its nature, before the statute of charitable uses; but not in the case of charities incorporated and established by the king's charter, under the great seal, which are established by proper authority allowed." And again: "It is true that an information in the name of the attorney-general, as an officer of the Crown, was not a head of the statute of Charitable Uses, because that original jurisdiction was exercised in this court before. But that was always in cases now provided for by that statute; that is, charities at large, not properly and regularly provided for in charters of the Crown."

§ 1150. It was manifestly, therefore, the opinion of Lord Hardwicke, that, independently of the statute of Elizabeth, the Court of Chancery did exercise original jurisdiction in cases of charities at large, which he explains to mean charities not regulated by charter. But it does not appear that his attention was called to discriminate between such as could take effect at law, by reason of the interposition of a feoffee or devisee, capable of taking, and those where the purpose was general charity, without the interposition of any trust to carry it into effect. The same remark applies to the *dictum* by Sir Joseph Jekyll.

§ 1151. In a still later case (*l*), which was an information to establish a charity, and aid a conveyance in remainder to certain

(*k*) *S.p. Att.-Gen. v. Brereton*, 2 Ves. Sen. 425, 427; *post*, § 1163.

(*l*) *Att.-Gen. v. Tancred*, 1 W. Bl. 90; *s.c.* Ambler, 351; 1 Eden, 10.

officers of Christ's College to certain charitable uses, Lord Keeper Henley (afterwards Lord Northington) is reported to have said: "The conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body; and, therefore, there is a want of proper persons to take in perpetual succession. The only doubt is, whether the court shall supply this defect for the benefit of the charity, under the statute of Elizabeth. And I take the uniform rule of this court, before, at, and after the statute of Elizabeth, to have been, that, where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under the statute of Henry VIII., yet they were always considered as good in equity, if given to charitable uses." And he then proceeded to declare, that he was obliged, by the uniform course of precedents, to assist the conveyance; and, therefore, he established the conveyance expressly under the statute of Elizabeth.

§ 1152. There is some reason to question, whether the language here imputed to Lord Northington is minutely accurate. His lordship manifestly aided the conveyance, as a charity, in virtue of the statute of Elizabeth. And there is no doubt, that it has been the constant practice of the court, since that statute, to aid defects in conveyances to charitable uses. But it is by no means clear that such defects were aided, before that statute. The old cases, although arising before the statute, were deemed to be within the reach of that statute by its retrospective language; and were expressly decided on that ground (*m*). The very case put of devises to corporations, which are void under the statute of Henry VIII., and are held good solely by the statute of Elizabeth, shows that his lordship was looking to that statute; for it is plain, that a devise, void by statute, cannot be made good upon any principles of general law. What, therefore, is supposed to have been stated by him, as being the practice before the statute, is probably, if not founded in the mistake of the reporter, an inadvertent statement of the learned chancellor. The same case is reported in another book, where the language reported to have been used by him is: "The constant rule of the court has always been, where a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment; as in *Jesus College, Collison's Case* in Hobart, 136" (*n*). Now, *Collison's Case* was expressly held to be sustainable, only as an appointment under the statute of Elizabeth; and this shows that the language of his lordship was probably meant to be limited to cases governed by that statute.

§ 1153. In a more recent charity case, Sir Arthur Piggott in

(*m*) *Collison's Case*, Hob. 136; s.c. Moore, 888; id. 822; *Sir Thomas Middleton's Case*, Moore, 889; *Rivett's Case*, Moore, 890, and the cases cited in Raithby's note to *Att.-Gen. v. Ryre*, 2 Vern. 453; Duke on Charit. 74, 77, 83, 84; Bridg. on Charit. 366, 370, 379, 380; Duke on Charit. 105 to 113.

(*n*) Ambler, 351.

argument said: "The difference between the case of individuals and that of charities is founded on a principle which has been established ever since the statute of Charitable Uses, in the reign of Elizabeth, and has been constantly acted upon from those days to the present." Lord Eldon adopted the remark, and said: "I am fully satisfied as to all the principles laid down in the course of this argument, and to accede to them all." His lordship then proceeded to discuss the most material of the principles and cases from the time of Elizabeth, and built his reasoning, as indeed he had built it before, upon the supposition, that the doctrine in chancery, as now established, rested mainly on that statute (o).

§ 1154. Such were the principal cases, or at least the principal cases which my own researches had brought to my notice at the time when the present work was first published, wherein the jurisdiction of chancery over charities, antecedent to the statute of Elizabeth, had been directly or incidentally discussed. The circumstance that no cases, prior to that time, could then be found in equity jurisprudence; the tradition that had passed down to our own times, that original bills to establish charities were first entertained in the time of Lord Ellesmere; the fact, that the cases immediately succeeding that statute, in which devises, void at law, were held good in equity as charities, might have been argued and sustained upon the general jurisdiction of the court, if it then existed; and yet were exclusively argued and decreed upon the footing of that statute; these facts and circumstances did certainly seem to afford a strong presumption that the jurisdiction of the court to enforce charities, where no trust is interposed, and where no devisee is *in esse*, and where the charity is general and indefinite, both as to persons and objects, mainly rests upon the constructions (whether ill or well founded, is now of no consequence) of the statute of Elizabeth.

§ 1154a. This subject has undergone a more full and elaborate consideration. Lord Eldon, in a case calling for an expression of his opinion upon the point in 1826, took occasion to observe: "It may not be quite clear that these instruments, originally void, were held to be valid merely by the effect of the 43rd of Elizabeth. It might have been supposed that there was in the court a jurisdiction to render effective an imperfect conveyance for charitable purposes; and the statute has, perhaps, been construed with reference to such, the supposed jurisdiction of this court; so that it was not by the effect of the 43rd Elizabeth alone, but by the operation of that statute on a supposed antecedent jurisdiction in the court, that void devises to charitable purposes were sustained. Out of that supposed jurisdiction this construction of the statute may have arisen" (p). In 1834, in

(o) *Mills v. Farmer*, 1 Meriv. 55, 86, 94, 100; *Moggridge v. Thackwell*, 7 Ves. 36; *Att.-Gen. v. Bowyer*, 3 Ves. 714, 726.

(p) *Att.-Gen. v. Skinners' Co.*, 2 Russ. 407, 420.

the case of the Brentwood Grammar School, a charity founded in the reign of Philip and Mary, came under the consideration of Sir John Leach, the Master of the Rolls, and it then appeared that the charity was mainly to found and endow a grammar school at Brentwood, and was established by a decree of the Court of Chancery as early as the 12th of Elizabeth, although it included also a provision for the support of "five poor folks in Southweald"; and Sir John Leach, upon the bill before him for the establishment of a proper scheme for the charities, affirmed the original decree (q). Lord Redesdale, in a very important case before the House of Lords, in 1827, expressed himself to the following effect: "We are referred to the statute of Elizabeth, with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction, it created no new law; it created a new and ancillary jurisdiction, a jurisdiction borrowed from the elements which I have mentioned; a jurisdiction created by a commission to be issued out of the Court of Chancery to enquire whether the funds given for charitable purposes, had or had not been misapplied, and to see to their proper application; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reversing the controlling jurisdiction of the Court of Chancery, as it existed before the passing of that statute; and there can be no doubt that, by information by the attorney-general, the same thing might be done. . . . While proceedings under that statute were in common practice (as appears in that collection which is called Duke's Charitable Uses) you will find it stated that in certain cases, although a commission might issue under the statute, an information by the attorney-general was the better remedy. In process of time, indeed, it was found that the commission of charitable uses was not the best remedy, and that it was better to resort again to the proceedings by way of information in the name of the attorney-general. The right which the attorney-general has to file an information is a right of prerogative; the king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases; the case of lunatics, where he has also a special prerogative to take care of the property of a lunatic, and where he may grant the custody to a person who, as a committee, may proceed on behalf of the lunatic, or where there is no such grant the attorney-general may proceed by his information" (r).

(q) *Att.-Gen. v. Brentwood School*, 1 Myl. & K. 376.

(r) *Att.-Gen. v. Corporation of Dublin*, 1 Bligh. N. S. 312, 347, 348. See also *Corporation of Ludlow v. Greenhouse*, 1 Bligh N. S. 61, 62, 68.

§ 1154b. On a still more recent occasion in Ireland, Lord Chancellor Sugden examined the whole subject with great diligence and learning, and reviewed historically the leading authorities. The conclusion at which he arrived was, that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth (s). But the most authentic and at the same time the most satisfactory information upon the whole subject is to be found in the report of the Commissioners upon the Public Records published by Parliament in 1827. From this most important document it appears, by a great number of cases previous to the statute, that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon and enforced in, the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as can be gathered from the records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take (t).

§ 1155. But however extensive the jurisdiction may originally have been over the subject of charities, and however large its application, it is very certain that, since the statute of Elizabeth, no bequests were deemed within the authority of chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable or which, by analogy, were deemed within its spirit and intendment (u), and this, as already noted, has been confirmed by the Mortmain and Charitable Uses Act, 1888, s. 13, sub-s. 2. A bequest may, in an enlarged sense, be charitable, and yet not within the purview of the statute. Charity, as Sir William Grant (the Master of the Rolls) has justly observed, in its widest sense, denotes all the good affections men ought to bear towards each other; in its more restricted and common sense, relief to the poor. In neither of these senses is it employed in the Court of Chancery (x). In that court it means such charitable bequests only as are within the letter and the spirit of the statute of Elizabeth.

§ 1156. Therefore, where a testatrix bequeathed the residue of her personal estate to the Bishop of D., to dispose of the same "to such

objects of benevolence and liberality as the bishop in his own discretion

(s) *The Incorporated Society v. Richards*, 1 Conn. & Law. 58; s.c. 1 Dru. & Warr. 258.

(t) 1 Cooper's Public Records, 324, Calendar of Proceedings in Chancery.

(u) See 2 Roper on Legacies, by White, ch. 19, § 1, pp. 111, 112; *Nash v. Morley*, 5 Beav. 177, 182, 183.

(x) *Morice v. Bishop of Durham*, 9 Ves. 399; s.c. 10 Ves. 522; *Brown v. Yeall*, 7 Ves. 50, note (a); *Moggridge v. Thackwell*, 7 Ves. 36; *Nightingale v. Goulburn*, 5 Hare, 485; affirmed 2 Phil. 594.

shall most approve of," and she appointed the bishop her executor; on a bill brought to establish the will, and declare the residuary bequest void, the bequest was held void, upon the ground, that objects of "benevolence and liberality" were not necessarily charitable within the statute of Elizabeth, and were, therefore, too indefinite to be executed. On that occasion, it was said by the court, that no case had yet been decided, in which the court had executed a charitable purpose, unless the will had contained a description of that which the law acknowledged to be a charitable purpose, or had devoted the property to purposes of charity in general, in the sense in which that word is used in the Court of Chancery. The devise here was of a trust of so indefinite a nature, that it could not be under the control of the court; so that the administration of it could be reviewed by the court, or so that, if the trustee died, the court itself could execute the trust. It fell, therefore, within the rule of the court, that, where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taking it shall be deemed a trustee, if not for those who were to take by the will, for those who are to take under the disposition of the law. And the residue was accordingly decreed to the next of kin (y).

§ 1156a. Upon the like ground, a bequest of personalty to trustees to be applied "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," has been held void for vagueness and uncertainty, and as not being within the scope of the statute of Elizabeth (z).

§ 1157. Upon the like principles, a bequest in these words, "In case there is any money remaining, I should wish it to be given in private charity," has been held inoperative; for the objects are too general and indefinite, not being within the statute of Elizabeth, and not being so ascertained, that the trust could be controlled or executed by a court of equity (a). So, a bequest to trustees, "to such charitable or public purpose or purposes, person or persons, as the trustees should, in their discretion, think fit," has been held void: for it is in effect a gift in trust, to be absolutely disposed of in any manner that the trustees might think fit, consistent with the laws of the land; which is too general and undefined to be executed (b). So, a bequest "for such benevolent, religious, and charitable purposes, as the trustees should, in their discretion, think most beneficial," has been held void, upon the ground of its generality, as it did not limit the gift to cases of charity, but extended it to those of benevolence also (c). So, a bequest to executors, of a fund, "to apply it to and for such charitable and other purposes as they shall think fit, without being accountable to any person for their

(y) *Morice v. Bishop of Durham*, 9 Ves. 399; s.c. 10 Ves. 522.

(z) *Kendall v. Granger*, 5 Beav. 300.

(a) *Ommaney v. Butcher*, 1 Turn. & Russ. 260, 270.

(b) *Vezey v. Jamson*, 1 Sim. & Stu. 69.

(c) *Williams v. Kershaw*, cited 1 Keen, 232.

disposition thereof," has been held void on account of its indefiniteness (*d*).

§ 1158. So, that it appears from these cases, that, since the statute of Elizabeth, the Court of Chancery will not establish any trusts for indefinite purposes of a benevolent nature, not charitable within the purview of that statute, although there is an existing trustee, in whom it is vested; but it will declare the trust void, and distribute the property among the next of kin. And yet, if there were an original jurisdiction in chancery over all bequests, charitable in their own nature, and not superstitious, to establish and regulate them independent of the statute, it is not easy to perceive why an original bill might not be sustained in that court to establish such a bequest, especially, where a trustee is interposed to effectuate it; for the statute does not contain any prohibition of such a bequest.

§ 1159. A discussion of the procedure by commission established by the statute of Elizabeth, which was seldom resorted to, as noticed before, has now become unnecessary by reason of subsequent legislation although the learned author might not have been justified in ignoring it, notwithstanding it was more cumbrous and inefficient even than the chancery procedure of his day. The administration of trusts at the present day is supervised by the Charity Commissioners established by 16 & 17 Vict. c. 137, s. 17 (*e*).

§ 1160. The uses enumerated in the preamble of the statute, as charitable, are gifts for the relief of aged, impotent, and poor people; for maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars in universities; for repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; for education and preferment of orphans; for, or towards the relief, stock, or maintenance for houses of correction; for marriages of poor maids; for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants, concerning payments of fifteenths, setting out of soldiers, and other taxes. These are all the classes of uses which the statute in terms reaches.

§ 1161. From this summary statement of the contents of the statute, it is apparent that the authority conferred on the Court of Chancery, in relation to charitable uses, is very extensive; and it is not at all wonderful, considering the religious notions of the times, that the statute should have received the most liberal, not to say, in some instances, the most extravagant, interpretation. It is very easy to perceive how it came to pass, that, as power was given to the court in the most unlimited terms, to annul, diminish, alter, or enlarge the orders

(*d*) *Ellis v. Selby*, 1 Myl. & Cr. 286.

(*e*) See *Rendall v. Blair*, 45 Ch. D. 139; *In re Clergy Orphan Corporation*, [1894] 3 Ch. 145; *In re Gilchrist Charity*, [1895] 1 Ch. 367.

and decrees of the commissioners, and to sustain an original bill in favour of any party aggrieved by such order or decree, the court arrived at the conclusion that it might, by original bill, do that in the first instance which it certainly could do circuitously upon the commission (f). And as in some cases, where the trust was for a definite object, and the trustee living, the court might, upon its ordinary jurisdiction over trusts, compel an execution of it by an original bill, independently of the statute (g), we are at once let into the origin of the practice of mixing up the jurisdiction by original bill with the jurisdiction under the statute, which Lord Hardwicke alluded to in the passage already quoted (h), and which at that time was inveterately established. This mixture of the jurisdiction serves also to illustrate the remark of Lord Nottingham, in the case already cited (i); where, upon an original bill, he decreed a devise to charity, void at law, to be good in equity, as an appointment; although before the statute of Elizabeth no such decree could have been made.

§ 1162. Upon the whole, it seems now to be the better opinion, that the jurisdiction of the Court of Chancery over charities, where no trust is interposed, or where there is no person, *in esse*, capable of taking, or where the charity is of an indefinite nature, is to be referred to the general jurisdiction of that court, anterior to the statute of Elizabeth. This opinion is supported by the preponderating weight of the authorities, speaking to the point, and particularly by those of a very recent date, which appear to have been most thoroughly considered. The language, too, of the statute, lends a confirmation to this opinion, and enables us to trace what would otherwise seem a strange anomaly, to a legitimate origin.

§ 1163. Be this as it may, it is very certain that the Court of Chancery will now relieve by original bill or information upon gifts and bequests, within the statute of Elizabeth; and informations by the attorney-general, to settle, establish, or direct such charitable donations, are common in practice. Indeed, the mode of proceeding by commission under the statute of Elizabeth, has been long abandoned, and the mode of proceeding by information by the attorney-general, is now become absolutely universal, so as to amount to a virtual extinguishment of the former remedy (k). But, where the gift is not a charity within the statute, no information lies in the name of the attorney-general to enforce it (l). And if an information is brought in

(f) See the *Poor of St. Dunstan v. Beauchamp*, 1 Ch. Cas. 193, 2 Co. Inst. 711; *Corporation of Burford v. Lenthall*, 2 Atk. 551.

(g) *Att.-Gen. v. Dixie*, 13 Ves. 519; *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305; *Green v. Rutherford*, 1 Ves. 462; *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 491, 499.

(h) *Corporation of Burford v. Lenthall*, 2 Atk. 520; *ante*, § 1148.

(i) *Anon.*, 1 Ch. Cas. 267.

(k) *Corporation of Ludlow v. Greenhouse*, 1 Bligh N. S. 61, 62, 68.

(l) *Att.-Gen. v. Hewer*, 2 Vern. 387.

the name of the attorney-general, and it appears to be such a charity as the court ought to support, although the information is mistaken in the title or in the prayer of relief, yet the bill will not be dismissed; but the court will support it and establish the charity in such a manner as by law it may (*m*). However, the jurisdiction of chancery over charities does not exist where there are local visitors appointed: for it then belongs to them and their heirs to visit and control the charity (*n*).

§ 1164. As to what charities are within the purview of the statute, it may be proper to say a few words in this place in addition to what has been already suggested (*o*), although it is impracticable to go into a thorough review of the cases (*p*). It is clear, that no superstitious uses are within the purview of it. When the learned author wrote, the Court of Chancery regarded all gifts in furtherance of the Roman Catholic faith (*q*) and the Jewish faith (*r*) as falling within the purview of the preamble to the statute 1 Ed. VI. c. 14. But the doctrines of Protestant Dissenters do not seem to have fallen under a similar ban (*s*). It has recently been held in the House of Lords (*t*), that the statute has been repealed by subsequent legislation, and that a legacy may be given for masses for the dead, which was one of the illustrations given by the author. The topic suggests a contrast, namely, a gift that may be applied in furthering discussions impugning the Christian faith. This is not necessarily obnoxious as tending to promote blasphemy (*u*). But there are certain uses which, though not within the strict letter, are yet deemed charitable within the equity of the statute. Such is money given to maintain a preaching minister; to maintain a schoolmaster in a parish; for the setting-up of a hospital for the relief of poor people; for the building of a sessions house for a city or county; for the making of a new, or for the repairing of an old pulpit in a church; for the buying of a pulpit-cushion or pulpit-cloth; or for the setting of new bells, where there are none, or for mending of them, where they are out of order (*x*).

(*m*) *Att.-Gen. v. Smart*, 1 Ves. Sen. 72; *Att.-Gen. v. Jeames*, 1 Atk. 355; *Att.-Gen. v. Breton*, 2 Ves. Sen. 425; *Att.-Gen. v. Middleton*, 2 Ves. Sen. 327; *Att.-Gen. v. Parker*, 1 Ves. Sen. 43; s.c. 2 Atk. 576; *Att.-Gen. v. Whitley*, 11 Ves. 241, 247; *ante*, § 1149.

(*n*) *Att.-Gen. v. Price*, 3 Atk. 108; *Att.-Gen. v. Governors of Harrow School*, 2 Ves. Sen. 552.

(*o*) *Ante*, § § 1155 to 1158.

(*p*) They are enumerated with great particularity in *Duke on Charitable Uses*, by Bridgman; in *Com. Dig. Charitable Uses*; 2 Roper on Legacies, by White, ch. 19, §§ 1 to 5, pp. 109 to 164.

(*q*) *West v. Shuttleworth*, 3 Myl. & K. 684.

(*r*) *Da Costa v. De Pas*, 2 Swanst. 487.

(*s*) *Att.-Gen. v. Hickman*, 1 Eq. Cas. Abr. 193; *Att.-Gen. v. Pearson*, 3 Mer. 409. See, however, *Shore v. Wilson*, 9 Cl. & F. 355.

(*t*) *Bourne v. Keane*, [1919] A. C.

(*u*) *Bowman v. Secular Society, Lim.* [1917] A. C. 406.

(*x*) *Duke on Charit.* 105, 113; *Bridgman on Duke on Charit.* 354; *Com. Dig. Charitable Uses*, N. 1. So a bequest to keep in repair a tombstone or an ornamental window, though in memory of a particular person, is good. *Hoare v. Osborne*, L. R. 1 Eq. 585.

§ 1165. Charities are also so highly favoured in the law, that they have always received a more liberal construction than the law will allow in gifts to individuals (*y*). In the first place, the same words in a will, when applied to individuals, may require a very different construction, when they are applied to the case of a charity. If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards he appoints no executor; or if, having appointed an executor, the latter dies in the lifetime of the testator, and no other person is appointed in his stead; in either of these cases, as these bequests are to individuals, the testator will be held intestate; and his next of kin will take the estate. But if a like bequest be given to the executor in favour of a charity, the court will, in both instances, supply the place of an executor, and carry into effect that very bequest, which, in the case of individuals, must have failed altogether (*z*).

§ 1166. Again, in the case of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed; or, if one being appointed, he dies in the testator's lifetime, and no other is appointed in his place; or the appointment becomes nugatory; the bequest becomes a mere nullity. Yet such a bequest, if expressed to be for a charity, would be good (*a*). So, if a legacy is given to trustees to distribute in charity, and they all die in the testator's lifetime; although the legacy becomes thus lapsed at law (and if the trustees had taken to their own use, it would have been gone for ever), yet it will be enforced in equity (*b*).

§ 1167. Although in carrying into execution a bequest to an individual, the mode, in which the legacy is to take effect, is deemed to be the substance of the legacy; yet, where the legacy is to a charity, the court will consider charity as the substance; and in such cases, and in such cases only, if the mode pointed out fail, it will provide another mode, by which the charity may take effect, but by which no other charitable legatees can take (*c*). A still stronger case is, that, if the testator had expressed (*d*) an absolute intention to give a legacy to charitable purposes, but he has left uncertain, or to some future act, the mode by which it is to be carried into effect; there, the court if no mode is pointed out, will of itself supply the defect, and enforce the charity (*e*). Therefore, it has been held, that, if a man devises a sum of money to charitable uses as he shall direct by a codicil annexed to his will, or by a note in writing, and he afterwards leaves no direction

(*y*) 2 Roper on Legacies, by White, ch. 19, § 5, pp. 164 to 222.

(*z*) *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55.

(*a*) *Moggridge v. Thackwell*, 7 Ves. 36; *In re Hampton, Public Trustee v. Hampton*, 88 L. J. Ch. 103.

(*b*) *Moggridge v. Thackwell*, 3 Bro. C. C. 517; 1 Ves. Jun. 464; 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55.

(*c*) *Ironmongers' Co. v. Att.-Gen.*, 10 Cl. & F. 904.

(*d*) *Corporation of Gloucester v. Osborn*, 1 H. L. C. 272; affirming 3 Hare, 131.

(*e*) *Moggridge v. Thackwell*, 7 Ves. 36.

by note or codicil, the court will dispose of it, to such charitable purposes as it thinks fit. So, if a testator bequeaths a sum for such a school as he shall appoint, and he appoints none, the court may apply it for what school it pleases (f).

§ 1168. The doctrine was pressed yet farther; and it was established, that, if the bequest indicate a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it for the purpose of some other charity, agreeably to the law, in the room of that contrary to it (g). Thus, before the removal of religious disabilities, a sum of money bequeathed to found a Jews' synagogue has been enforced by the court as a charity, and judicially transferred to the benefit of a founding hospital (h). And a bequest for the education of poor children in the Roman Catholic faith, has been decreed in chancery to be disposed of by the king at his pleasure under his sign-manual (i).

§ 1169. Another principle, equally well established, is, that, if the bequest be for charity, it matters not how uncertain the persons or the objects may be; or whether the persons, who are to take, are *in esse*, or not; or whether the legatee be a corporation capable in law of taking or not; or whether the bequest can be carried into exact execution or not; for, in all these and the like cases, the court will sustain the legacy, and give it effect according to its own principles (k). And where a literal execution becomes inexpedient or impracticable, the court will execute it, as nearly as it can, according to the original purpose, or (as the technical expression is) *cy-près* (l). This doctrine seems to have been borrowed from the Roman law; for by that law, donations for public purposes were sustained and were applied, when illegal, *cy-près*, to other purposes, at least one hundred years before Christianity became the religion of the empire (m).

§ 1170. Thus, a devise of lands to the churchwardens of a parish (who are not a corporation capable of holding lands), for a charitable purpose, although void at law, will be sustained in equity (n). So, if a corporation, for whose use a charity is designed, is not *in esse* and cannot come into existence but by some future act of the Crown, as, for instance, a gift to found a new college, which requires an act of incorporation, the gift will be held valid, and the court will execute it (o). So, if a devise be to an existing corporation by a misnomer,

(f) *Att.-Gen. v. Syderfin.*, 1 Vern. 224; s.c. 2 Freem. 261; *Moggridge v. Thackwell*, 7 Ves. 36; *In re Davis*, *Harmen v. Hillyer*, [1902] 1 Ch. 876.

(g) *Da Costa v. De Paz*, 2 Swanst. 487 n.; s.c. *Cary v. Abbott*, 7 Ves. 490.

(h) *Da Costa v. De Paz*, 2 Swanst. 487 n.; s.c. 1 Vern. 251.

(i) *Cary v. Abbott*, 7 Ves. 490; *De Themmines v. De Bonneval*, 5 Russ. 292.

(k) *Post*, § 1181.

(l) *Ironmongers' Co. v. Att.-Gen.*, 10 Cl. & F. 908.

(m) *Per* Lord Justice Wilmot, *Wilmot's Notes*, pp. 53, 54, citing *Dig. Lib. 33, tit. 2, §§ 16, 17, De Usu et Usufruct. Legatorum*.

(n) 1 Burn, *Ecc. Law*, 226; *Duke*, 33, 115; *Com. Dig. Chancery*, 2 N. 2.

(o) *Att.-Gen. v. Bowyer*, 3 Ves. 714.

which might make it void at law, it will be held good in equity (*p*). So, where a devise was to the poor generally, the court decreed it to be executed in favour of three public charities in London (*q*). So, a legacy towards establishing a bishop in America, was held good although none was yet appointed (*r*). So, where a bequest of £1,000 was "to the Jews' Poor, Mile End," and there were two charitable institutions for Jews at Mile End, it not appearing which of the charities was meant, the court held, that the fund ought to be applied, *cy-près*, and divided the bequest between the two institutions (*s*).

§ 1170*a*. And where a charity is so given that there can be no objects, the court will order a new scheme to execute it. But in all cases regard must be had to the intention of the founder as originally expressed, and due provisions made for the performance of his wishes (*t*). And if objects may, though they do not at present, exist, the court will keep the fund for the contemplated scheme (*u*). And when the specified objects cease to exist, the court will remodel the charity (*x*). Thus, where there was a bequest of the residue of the testator's estate to a company, to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards necessitated freemen of the company; there being no British slaves in Turkey or Barbary to redeem, the court directed a master to approve of a new scheme *cy-près*; and in that case, it further approved a scheme under which, after reserving a fund to redeem British slaves in Turkey or Barbary, other charities named by the testator were augmented (*y*). But on the matter finally coming before the court, the scheme was so far modified that one only of the charities, and that in a modified form, shared in the surplus (*z*). Where the charitable gift is of a legacy, and there is a residuary gift, upon failure of the charitable object in the lifetime of the testator there is a lapse, and consequently no place for the application of the fund *cy-près* (*a*).

(*p*) *Anon.*, 1 Ch. Cas. 267; *Att.-Gen. v. Platt*, Rep. temp. Finch, 221; *In re Maquire*, L. R. 9 Eq. 632; *In re Faraker*, *Faraker v. Durell*, [1912] 2 Ch. 488.

(*q*) *Att.-Gen. v. Peacock*, Rep. temp. Finch, 245; *Owens v. Bean*, *ibid.* 395; *Att.-Gen. v. Syderfin*, 1 Vern. 224; s.c. 7 Ves. 43 n.; *Clifford v. Francis*, 1 Freem. 330.

(*r*) *Att.-Gen. v. Bishop of Chester*, 1 Bro. C. C. 444.

(*s*) *Bennett v. Hayter*, 2 Beav. 81.

(*t*) *Ironmongers' Co. v. Att.-Gen.*, 10 Cl. & F. 908; *In re Lambeth Charities*, 22 L. J. Ch. 959; *In re Church Estate Charity*, *Wandsworth*, L. R. 6 Ch. 296.

(*u*) *Att.-Gen. v. Oglander*, 3 Bro. C. C. 166. For a case where the court after a new scheme had been reformed refused to change it for one identical with the original purpose of the charity, see *Att.-Gen. v. Stewart*, L. R. 14 Eq. 17.

(*x*) *Att.-Gen. v. City of London*, 3 Bro. C. C. 171; s.c. 1 Ves. Jun. 243.

(*y*) *Att.-Gen. v. Ironmongers' Co.*, 2 M. & K. 576.

(*z*) *Ironmongers' Co. v. Att.-Gen.*, 10 Cl. & F. 908.

(*a*) *In re Rymer*, *Rymer v. Stanfield*, [1895] 1 Ch. 19.

§ 1171. In further aid of charities, the court will supply all defects of conveyances, where the donor hath a capacity, and a disposable estate, and his mode of donation does not contravene the provisions of any statute (b). The doctrine is laid down with great accuracy by Duke, who says that a disposition of lands, &c., to charitable uses is good, "albeit there be defect in the deed, or in the will, by which they were first created and raised; either in the party trusted with the use, where he is misnamed, or the like; or in the party or parties for whose use, or that are to have the benefit of the use; or where they are not well named, or the like; or in the execution of the estate, as where livery of seisin or attornment is wanting, or the like. And, therefore, if a copyholder doth dispose of copyhold land to a charitable use without a surrender; or a tenant in tail convey land to a charitable use without a fine; or a reversion without attornment or insolvency; and in divers such like cases, &c., this statute shall supply all the defects of assurance; for these are good appointments within the statute" (c). But a parol devise to charity out of lands being defective as a will, which is a manner of conveyance, which the testator intended to pass it by, can have no effect, as an appointment which he did not intend (d). Yet it has, nevertheless, been held, where a married woman, administratrix of her husband, and entitled to certain personal estates belonging to him (namely, a *chose in action*), afterwards intermarried, and then, during coverture, made a will, disposing of that estate, partly to his heirs, and partly to charity, that the bequest, although void at law, was good as an appointment under the statute of Elizabeth, for this reason; "that the goods in the hands of administrators are all for charitable uses; and the office of the ordinary, and of the administrator, is, to employ them to pious uses; and the kindred and children have no property nor pre-eminence but under the title of charity" (e).

§ 1172. With the same view, the Court of Chancery was, in former times, most astute to find out grounds to sustain charitable bequests. Thus, an appointment to charitable uses under a will, that was precedent to the statute of Elizabeth, and so was utterly void, was held to be made good by the statute (f). So, a devise, which was not within the statute, was nevertheless decreed as a

(b) *Case of Christ's College*, 1 W. Bl. 90; *Att.-Gen. v. Rye*, 2 Vern. 453, and Raithby's notes; *Mills v. Farmer*, 1 Meriv. 55; *Att.-Gen. v. Bowyer*, 3 Ves. Jun. 714; *Incorporated Society v. Richards*, 1 Dru. & War. 258.

(c) Duke on Charit. Uses, 84, 85; Bridgman on Duke on Charit. Uses, 355; *Christ's Hospital v. Hawes*, Bridgman on Duke on Charit. Uses, 371; 1 Burn's Eccl. Law, 226; *Tuffnel v. Page*, 2 Atk. 37; *Att.-Gen. v. Rye*, 2 Vern. 453; and Raithby's notes; *Incorporated Society v. Richards*, 1 Dru. & War. 258.

(d) *Jenner v. Harper*, Prec. Ch. 389; 1 Burn's Eccl. Law, 226.

(e) *Damus's Case*, Moore, 822. And see *Att.-Gen. v. Syderfin*, cited and explained 7 Ves., at p. 43 n.

(f) *Smith v. Stowell*, 1 Ch. Cas. 195; *Collison's Case*, Hob. 136.

charity, and governed in a manner wholly different from that contemplated by the testator, although there was nothing unlawful in his intent; the Lord Chancellor giving as his reason, *Summa est ratio quæ pro religione facit*. So, where the charity was for a weekly sermon to be preached by a person to be chosen by the greatest part of the best inhabitants of the parish, it was treated as a wild direction; and a decree was made, that the bequests should be to maintain a catechist in the parish, to be approved by the Bishop (g).

§ 1173. So, although the statute of wills of Henry VIII. did not allow devises of lands to corporations to be good, yet such devises to corporations for charitable uses were held good, as appointments under the statute of Elizabeth (h). Lord Chancellor Cowper, in a case where he was called upon to declare a charitable bequest valid, notwithstanding the will was not executed according to the statute of Frauds, and in which these cases were cited, observed: "I shall be very loth to break in upon the statute of frauds and perjuries in this case, as there are no instances where men are so easily imposed upon, as the time of their dying, under the pretence of charity."—"It is true, the charity of judges has carried several cases on the statute of Elizabeth to great lengths; and this occasioned the distinction between operating by will and by appointment, which, surely, the makers of that statute never contemplated" (i).

§ 1174. It has been already intimated, that the disposition of modern judges has been to curb this excessive latitude of construction, assumed by the Court of Chancery in early times. But, however strange some of the doctrines already stated may seem to us, as they have seemed to Lord Eldon; yet they cannot now be shaken without doing that (as he has said), in effect, which no judge will avowedly take upon himself to do, to reverse decisions that have been acted upon for centuries (k).

§ 1175. A charity must be accepted upon the same terms upon which it is given, or it must be relinquished to the right heir; for it cannot be altered by any new agreement between the heir of the donor and the donees (l). And where several distinct charities are given to a parish for several purposes, no agreement of the parishioners can alter or divert them to any other uses (m).

§ 1176. The doctrine of *cy-près*, as applied to charities, was formerly pushed to a most extravagant length. But this sensible distinction now prevails, that the court will not decree the execution

(g) *Att.-Gen. v. Combe*, 2 Ch. Cas. 18.

(h) *Griffith Flood's Case*, Hob. 136.

(i) *Att.-Gen. v. Bains*, Prec. Ch. 271. And see *Addington v. Cann*, 3 Atk. 141.

(k) *Moggridge v. Thackwell*, 7 Ves. 36, 87.

(l) *Att.-Gen. v. Platt*, Rep. temp. Finch 221; *Att.-Gen. v. Margaret & Regius Professors, Cambridge*, 1 Vern. 55.

(m) *Man v. Ballet*, 1 Vern. 43, 1 Eq. Abr. 99, pl. 4; and see *Att.-Gen. v. Gleg*, 1 Atk. 356; *Ambler* 373.

of the trust of a charity in a manner different from that intended, except so far as it is seen that the intention cannot be literally executed. In that case another mode will be adopted, consistent with the general intention; so as to execute it, although not in mode, yet in substance. If the mode should become by subsequent circumstances impossible, the general object is not to be defeated, if it can in any other way be attained. Where there are no objects remaining to take the benefit of a charitable corporation, the court will dispose of its revenues by a new scheme, upon the principle of the original charities, *cy-près* (*n*). A new scheme will not, however, be ordered, if the institution is a permanent one, and the object of the testator was to benefit that institution generally, although the particular trustee named may have died in the lifetime of the testator; but the legacy will be ordered to be paid over to the proper officer of the institution (*o*).

§ 1177. The general rule is, that, if lands are given in trust for any charitable uses, which the donor contemplates to last for ever, the heir never can have the land back again (*p*). But if it should become impracticable to execute the charity as expressed, another similar charity will be substituted (*q*).

§ 1178. When the increased revenues of a charity are not exhausted by the original objects, the general rule as to the application of such increased revenues is, that they are not a resulting trust for the heirs-at-law; but they are to be applied to similar charitable purposes and to the augmentation of the benefits of the charity (*r*). But there must be distinguished those cases in which the donor has manifested a desire to benefit a particular individual, but has burdened his gift with charges in favour of a charity; in this case the charity is not entitled to share in the increased revenue (*s*).

§ 1179. In former times, the disposition of chancery to assist charities was so strong, that in equity the assets of the testator were held bound to satisfy charitable uses before debts or legacies; although at law the assets were held bound to satisfy debts before charities. But, even at law, charities were then preferred to other legacies (*t*). And this, indeed, was in conformity to the civil law, by which charitable legacies are preferred to all others. This doctrine, however, is now altered; and charitable legacies, in case of a deficiency of assets, abate in proportion, as well as other pecuniary legacies (*u*).

(*n*) *Ironmonger's Co. v. Att.-Gen.*, 10 Cl. & F. 908.

(*o*) *Walsh v. Gladstone*, 1 Phill. 290.

(*p*) *Att.-Gen. v. Bowyer*, 3 Ves. 714.

(*q*) *In re Latymer's Charity*, L. R. 7 Eq. 353.

(*r*) *Att.-Gen. v. Wax Chandlers' Co.*, L. R. 6 H. L. 1.

(*s*) *Att.-Gen. v. Dean and Chapter of Windsor*, 8 H. L. C. 369.

(*t*) High on Mortm. 67; Swinb. on Wills, Pt. 1, § 16, p. 72.

(*u*) *Fielding v. Bound*, 1 Vern. 240, and Raithby's note (2).

§ 1180. Courts of equity declined to marshal the testator's assets, in favour of any charitable bequests given out of a mixed fund of real and personal estate, without any distinction whether the real estate were freehold or leasehold estate, or pure personal estate, or mixed personal estate, and whether these bequests have been particular, or residuary, by refusing to direct the debts and other legacies to be paid out of the real estate, and reserving the personal to fulfil the charity, although the charity would be void as to the real estate (*x*). But this has been overridden by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), which empowers charities to take land by devise, or money directed to be laid out in land, subject only to the obligation to convert or retain in money the subject-matter of the gift.

§ 1181. It has been already stated that charitable bequests are not void on account of any uncertainty as to the persons or as to the objects to which they are to be applied. Almost all the cases on this subject have been collected, compared, and commented on by Lord Eldon, with his usual diligence and ability, in two decisions. The result of these decisions is, that, if the testator has manifested a general intention to give to charity, the failure of the particular mode, by which the charity is to be effected, will not destroy the charity. For the substantial intention being charity, equity will substitute another mode of devoting the property to charitable purposes, although the formal intention, as to the mode, cannot be accomplished (*y*). The same principle is applied when the persons or objects of the charity are uncertain, or indefinite, if the predominant intention of the testator is still to devote the property to charity (*z*). Thus where there was a bequest to "The Home for the Homeless," 27, Red Lion Square, London, and no such institution could be found, it was held that the gift was charitable, and did not fail (*a*). Upon a similar principle depends the disposition of increased revenue of funds devoted to specified objects of charity (*b*).

§ 1182. All these doctrines proceed upon the same ground, that is, the duty of the court to effectuate the general intention of the testator. And, accordingly, the application of them ceases whenever such general intention is not to be found. If, therefore, it is clearly seen that the testator had but one particular object in his mind, as, for example, to build a church if another will find the land, or to purchase a presentation to a particular school, and that purpose

(*x*) *In re Somers Cocks, Wegg Prosser v. Wegg Prosser*, [1895] 2 Ch. 449.

(*y*) *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55, s.c. 19 Ves. 483.

(*z*) *In re Pyne, Lilley v. Att.-Gen.*, [1903] 1 Ch. 83; *In re Mann, Hardy v. Att.-Gen.*, [1903] 1 Ch. 232.

(*a*) *In re Davis, Hanner v. Hillyer*, [1901] 1 Ch. 876.

(*b*) *Ante*, § § 1167, 1178.

cannot be answered, the next of kin will take, there being, in such a case, no general charitable intention (c). Even in the case of gifts or bequests to superstitious uses which (as we have seen) are not held to be void, but the funds are applied in chancery to other lawful objects of charity (d), the professed ground of the doctrine is (though certainly it is a most extraordinary sort of interpretation of intention) that the party has indicated a general purpose to devote the property to charity; and, therefore, although his specified object cannot be accomplished, yet his general intention of charity is supposed to be effectuated by applying the funds to other charitable objects. How courts of equity could arrive at any such conclusion, it is not easy to perceive, unless, indeed, where the nature of the gift necessarily led to the conclusion, that the object specified was a favourite, though not an exclusive, object of the donor. To such cases, it has, in modern times, been practically and justly limited.

§ 1183. Hence it has become a general principle in the law of charities, that, if the charity be of a general, indefinite, and mere private nature, or not within the scope of the statute of Elizabeth, it will be treated as utterly void, and the property will go to the next of kin. For, in such a case, as the trust is not ascertained, it must either go as an absolute gift to the individual selected to distribute it, or that individual must be a trustee for the next of kin (e). If the testator means to create a trust, and the trust is not effectually created, or fails, the next of kin must take. On the other hand, if the party selected to make the distribution is to take it, it must be upon the ground that the testator did not intend to create a trust, but to leave it entirely to the discretion of the party to apply the fund or not. The latter position is repugnant to the very purpose of the bequest; and, therefore, the interpretation is, that it is the case of a frustrated and void trust (f). A charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid, does not lapse (g).

§ 1184. It has been made a question, whether a court of equity, sitting in one jurisdiction, can execute any charitable bequests for foreign objects in another jurisdiction. The established doctrine seems to be that the English court will protect the property, but will

(c) *Cherry v. Mott*, 1 Myl. & Cr. 123; *In re White's Trusts*, 33 Ch. D. 449.

(d) *Ante*, § 1168.

(e) *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 521; *Omanney v. Butcher*, 1 Turn. & R. 260; *Hunter v. Att.-Gen.*, [1899] A. C. 309; *In re Davidson, Mintz v. Bourne*, [1909] 1 Ch. 567.

(f) *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 521; *Fowler v. Garlike*, 1 Russ. & M. 232; *Corp. of Beverley v. Att.-Gen.*, 6 H. L. C. 310; *Att.-Gen. v. Dean and Chapter of Windsor*, 8 H. L. C. 369.

(g) *In re Slevin, Slevin v. Hepburn*, [1891] 2 Ch. 236; *In re Davis Hannen v. Hüllyer*, [1901] 1 Ch. 876.

not interfere with the administration of the trust (*h*). Of course, this must be understood as subject to the implied exception, that the objects of the charities are not against the public policy or laws of the State where they are sought to be enforced, or put into execution; for no State is under any obligation to give effect to any acts of parties which contravene its own policy or laws. Upon this ground, where a bequest was given by the will of a testator in England, in trust for certain nunneries in foreign countries, it was held void, and the Court of Chancery refused to enforce it (*i*).

§ 1185. But every bequest, which, if it were to be executed in England, would be void under its mortmain laws, is not, as a matter of course, held to be void solely on that account when it is to be executed in a foreign country. There must be some other ingredient, making it reprehensible in point of public policy generally, or bringing it within the reach of the Mortmain Acts. Thus, for example, money bequeathed by a will to be laid out in lands abroad (as in Scotland), may be a valid bequest, and executed by an English court of equity, when money to be laid out in lands in England would be held a void bequest, as contrary to the Mortmain Acts of England (*k*).

§ 1186. Where money is bequeathed to charitable purposes abroad, which are to be executed by persons within the same territorial jurisdiction where the court of equity sits, the latter will secure the fund, and cause the charity to be administered under its own direction. But, where the charity is to be established abroad, and is to be executed by persons there, the court not having any jurisdiction to administer, it will simply order the money to be paid over to the proper persons in the foreign country, who are selected by the testator as the instruments of his benevolence; and will leave it to the foreign local tribunals to see to its due administration (*l*).

§ 1187. It is clear, upon principle, that the Court of Chancery, merely in virtue of its general jurisdiction over trusts, independently of the special jurisdiction conferred by the statute of 43rd Elizabeth, ch. 4, must, in many cases, have a right to enforce the due performance of charitable bequests; for (as has been well observed) the jurisdiction of courts of equity, with respect to charitable bequests, is derived from their general authority to carry into execution the trusts of a will or other instrument, according to the intention ex-

(*h*) *Att.-Gen. v. Lepine*, 2 Swanst. 181; *Forbes v. Forbes*, 18 Beav. 552; *Att.-Gen. v. Sturge*, 19 Beav. 597; *In re Davis' Trust*, 61 L. T. 430.

(*i*) *De Garcin v. Lawson*, 4 Ves. 433, note. See as to the actual decision *Bourne v. Keane*, [1919] A. C.

(*k*) *Oliphant v. Hendrie*, 1 Bro. C. C. 571, and Mr. Belt's note; *Mackintosh v. Townsend*, 16 Ves. 330.

(*l*) *Emery v. Hill*, 1 Russ. 112; *Collyer v. Burnett*, Taml. 79; *Mitford v. Reynolds*, 1 Phil. 185; *Att.-Gen. v. Sturge*, 19 Beav. 597; *In re Fraser*, *Yates v. Fraser*, 22 Ch. D. 827; *In re Davis' Trusts*, 61 L. T. 430.

pressed in that will or instrument (*m*). We shall presently see that this is strictly true in all cases where the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees who are specially appointed for the purpose (*n*). But there are many cases (as we shall also see) in which the jurisdiction exercised over charities in England can scarcely be said to belong to the Court of Chancery, as a court of equity; and where it is to be treated as a personal delegation of authority to the Chancellor, or as an act of the Crown, through the instrumentality of that dignitary (*o*).

§ 1188. The jurisdiction exercised by the Chancellor, under the statute of 43rd Elizabeth, ch. 4, over charitable uses, was held to be personal in him, and not exercised in virtue of his ordinary or extraordinary jurisdiction in chancery; and in this respect it resembled the jurisdiction exercised by him in cases of idiots and lunatics, which was exercised purely as the personal delegate of the Crown (*p*). Where a commission was issued under that statute, any person, excepting to the decree of the commissioners, was treated as a plaintiff in an original cause in chancery, and the respondents as defendants; and in the examination of witnesses in the cause, thus brought by way of appeal before the Chancellor, neither side was bound by what appeared before the commissioners; but they might set forth new matter, if they thought proper. If it were not considered on such an appeal, as an original cause, the court could know nothing of the merits; for the evidence before a jury, or before the commissioners under the commission, was not taken in writing, but was *vivâ voce*; and therefore it could not be known to the appellate court (*q*).

§ 1189. But, as the Court of Chancery might also proceed in many, although not in all, cases of charities by original bill, as well as by commission under the statute of Elizabeth, the jurisdiction became mixed in practice; that is to say, the jurisdiction of bringing informations in the name of the attorney-general was mixed with the jurisdiction given to the Chancellor by the statute (*r*). So that it was not always easy to ascertain in what cases he acted as a judge administering the common duties of a court of equity, and in what cases he acted as a mere delegate of the Crown, administering its peculiar duties and prerogatives. And again, there was a distinction between cases of charity, where the Chancellor was to act in the Court of Chancery, and cases where the charity was to be administered by the king, by his sign-manual. But in practice the cases have often been confounded from similar causes (*s*).

(*m*) *Att.-Gen. v. Ironmongers' Co.*, 2 Myl. & K. 581.

(*n*) *Post*, § 1191.

(*o*) *Post*, §§ 1188, 1190.

(*p*) 3 Black. Comm. 427, 428

(*q*) *Corporation of Burford v. Lenthall*, 2 Atk. 552; 3 Black. Comm. 427.

(*r*) *Ibid.*

(*s*) *Moggridge v. Thackwell*, 7 Ves. 83 to 86.

§ 1190. The general doctrine in England is, that the king, as *parens patriæ*, has a right to guard and enforce all charities of a public nature, by virtue of his general superintending power over the public interests, where no other person is intrusted with that right (t). But there does seem to be some difficulty in accepting the position advanced by the learned author that wherever money is given to charity generally, and indefinitely, without any trustees pointed out, who are to administer it, it might be considered as a personal trust, devolved upon the king, as a constitutional trustee, to be administered by him, for the Crown cannot be a trustee. The delegation to the Lord Chancellor by sign-manual may have been in the nature of the endorsement "let right be done" in other cases, where a petition of right is presented for leave to implead the king in his own court. That the earlier ground stated by the author is the correct one, is supported by the cases which establish that the attorney-general must be made a party to all judicial proceedings for administering a charity whether by information (u) or by summary process (x). In such a case, it is not, ordinarily, very important whether the Chancellor acts as the special delegate of the Crown, or the king acts under the sign-manual through his Chancellor guiding his discretion. In practice, however, it was found very difficult to distinguish in what cases the one or the other course ought, upon the strict principles of prerogative, to be adopted. For, where money has been given to trustees for charity generally, without any objects selected, the charity has sometimes been administered by the king, under his sign-manual, and sometimes by the Court of Chancery. Lord Eldon, after a full review of all the cases, came to the conclusion (which is now the settled rule) that, where there is a general indefinite purpose of charity, not fixing itself upon any particular object, the disposition and administration of it are in the king by his sign-manual. But where the gift is to trustees, with general objects, or with some particular objects pointed out, there the Court of Chancery would take upon itself the administration of the charity, and execute it under a scheme to be reported by a master (y).

§ 1191. But where a charity is definite in its objects, and lawful in its creation, and it is to be executed and regulated by trustees, whether they are private individuals or a corporation; there, the administration properly belongs to such trustees; and the king, as *parens patriæ*, has no general authority to regulate or control the administration of the funds (z). In all such cases, however, if there be any abuse or misuse of the funds by the trustees, the court will

(t) 3 Black. Comm. 437; *Moggridge v. Thackwell*, 7 Ves. 35.

(u) *Wellbeloved v. Jones*, 1 Sim. & St. 40.

(x) *Att.-Gen. v. Earl of Stamford*, 1 Phil. 737.

(y) *Moggridge v. Thackwell*, 7 Ves. 36.

(z) *Walsh v. Gladstone*, 1 Ph. 29; *In re Lea*, *Lea v. Cooke*, 34 Ch. D. 528.

interpose, at the instance of the attorney-general, or the parties in interest, to correct such abuse or misuse of the funds. But, in such cases, the interposition of the court is properly referable to its general jurisdiction, as a court of equity, to prevent abuse of a trust, and not to any original right to direct the management of a charity, or the conduct of the trustees (*a*). Indeed, if the trustees of the charity should grossly abuse their trust, a court of equity may go the length of taking it away from them, and commit the administration of the charity to other hands (*b*). But this is no more than the court will do, in proper cases, for any gross abuse of other trusts.

§ 1191*a*. Some doctrines on the subject of what constitutes such an abuse or misuse of charitable trusts, and especially of trusts of a religious nature, by trustees, are of such deep interest and general application that they seem to require a brief notice in this place. Where property is devoted to religious purposes, it is not competent for the trustees to depart from the actual or presumed intention of the donors that the religious doctrines which they themselves professed should be taught (*c*), and where the trust instrument is silent upon the subject, it is provided by section 2 of 7 & 8 Vict. c. 5, that in the case of protestant Dissenters, twenty-five years' continuous usage immediately preceding the suit is to be deemed conclusive evidence on the question. It is no cause for the removal of a trustee that he does not profess the religious belief or doctrine taught (*d*).

§ 1192. It seems, that, with a view to encourage the discovery of charitable donations, given for indefinite purposes, it is the practice for the Crown to reward the persons who make the communication if they can bring themselves within the scope of the charity, by giving them a part of the fund; and the like practice, whether well or ill founded, takes place, also, in relation to escheats (*e*).

§ 1192*a*. A contingent gift over from one charity to another is not affected by the rule against perpetuities (*f*). But a contingent gift over to an individual is so affected (*g*). The interest of a charity in an original gift of land must arise within the limits of the rule (*h*).

§ 1192*b*. It seems, that the Statute of Limitations, and the bar from lapse of time, will not be allowed to prevail in cases of charitable

(*a*) *Att.-Gen. v. Heelis*, 2 Sim. & St. 67; *Att.-Gen. v. Mayor of Exeter*, 2 Russ. 363; *Att.-Gen. v. St. John's Hospital*, 2 De G. J. & S. 621.

(*b*) *Drummond v. Att.-Gen. (Ireland)*, 2 H. L. C. 837.

(*c*) *Att.-Gen. v. Pearson*, 3 Mer. 353; *Shore v. Wilson*, 9 Cl. & F. 353; *General Assembly of Free Church of Scotland v. Lord Overtown*, [1904] A. C. 515. See *In re Perry's Almshouses*, [1899] 1 Ch. 21.

(*d*) *Att.-Gen. v. Clifton*, 32 Beav. 596; *Att.-Gen. v. St. John's Hospital, Bath*, 32 Beav. 596.

(*e*) Per Lord Eldon, in *Moggridge v. Thackwell*, 7 Ves. 36, 71.

(*f*) *Christ's Hospital v. Grainger*, 1 Mac. & G. 460.

(*g*) *In re Bower, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491.

(*h*) *Worthing Corporation v. Heather*, [1906] 2 Ch. 532.

trusts, in the same manner as it would in cases of mere private trusts. Thus, in the case of a charitable trust, where a corporation had purchased with notice of the trust, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts (i).

§ 1193. These are the principal doctrines and decisions, under the statute of Elizabeth, respecting charitable uses, which it seems most important to bring in review before the learned reader. It may not be useless to add, that the Statute of Mortmain and Charities, of the 9 Geo. 2, c. 36, very materially narrowed the extent and operation of the statute of Elizabeth; and formed a permanent barrier against what the statute declared to be a "public mischief," which "had of late greatly increased, by many large and improvident alienations or dispositions, made by languishing and dying persons, or others, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." This was compassed by a prohibition of all alienations of land except by deed executed by the donor twelve months before his death and enrolled. Many statutes were subsequently passed limiting the operation of the statute in favour of certain objects, but the principal Act was repealed by the Mortmain and Charitable Uses Act, 1887 (51 & 52 Vict. c. 42). The whole question is now regulated by the Act of 1888 and the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), which applies to the wills of testators dying after the passing of the Act. Stated shortly an alienation of land *inter vivos*, unless upon a sale, must be by deed executed in the presence of two witnesses twelve months before the death of the assurator, including in those twelve months the days of the making of the assurance and of the death and enrolled in the Central Office of the Supreme Court of Judicature within six months after the execution thereof. If the uses are declared by a separate instrument, the separate instrument must be so enrolled within six months after the making of the assurance of the land. Personal estate being stock in the public funds, if directed to be laid out in the purchase of land for charity, must be transferred in the public books at least six months before the death of the assurator, including in those six months the days of the transfer and of the death. Other personal estate, if directed to be laid out in the purchase of land for charity, must be assured with same formalities as if the subject-matter were land. As regards gifts by will, land may now be assured by will subject to a liability to convert into money within twelve months or such extended time as the Charity Commissioners or the Court may allow, and money directed to be laid out in the purchase of land for charity is discharged from this liability. The Court or the Charity Commissioners may sanction the retention of land "for actual occupation for the purposes of the charity and not as an investment." Gifts to the universities of Oxford,

(i) *Att.-Gen. v. Christ's Hospital*, 3 Myl. & K. 344.

Cambridge, London, Durham, and the Victoria and the colleges thereof, or any of the colleges of Eton, Winchester, Westminster, and Keble College, are exempted entirely from the operation of the Act. Gifts of land for a public park (limited to twenty acres if by will), a school-house for an elementary school, or for a public museum require enrolment in the books of the Charity Commissioners, within six months after the execution of the deed, or within six months after the death of the testator in the case of a will.

CHAPTER XXXII.

IMPLIED TRUSTS.

§ 1195. WE have now, in pursuance of the plan already laid down, gone over some of the most important branches of Express Trusts (*a*), and shall next proceed to the consideration of some of the more usual cases of IMPLIED TRUSTS, including therein cases of constructive and resulting trusts. Implied Trusts may be divided into two general classes: first, those which stand upon the presumed intention of the parties; secondly, those which are independent of any such intention, and are forced upon the conscience of the party by operation of law; as, for example, in cases of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature. It has been said to be a general rule that the law never implies, and a court of equity never presumes, a trust, except in case of absolute necessity (*b*). Perhaps this is stating the doctrine a little too strongly. The more correct exposition of the general rule would seem to be, that a trust is never presumed or implied, as intended by the parties, unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions (*c*).

§ 1196. And, first, let us consider such implied trusts as are founded in the supposed intention of the parties. The most simple form, perhaps, in which such an implied trust can be presented, is that of money, or other property, delivered by one person to another, to be by the latter paid or delivered over to and for the benefit of a third person. In such a case (as we have seen) (*d*) the party so receiving the money, or other property, holds it upon a trust; a trust necessarily implied from the nature of the transaction, in favour of such beneficiary, although no express agreement has been entered into, to that effect (*e*). But even here, the trust is not, under all circumstances, absolute; for if the trust is purely voluntary, and without any consideration, and the beneficiary has not become a party to it, by his express assent after notice of it, it is revocable; and if revoked, then the original trust is gone, and an implied trust results in favour of the party who originally created it (*f*).

(*a*) *Ante*, § § 980 to 982.

(*b*) Lord Nottingham, *Cook v. Fountain*, 3 Swanst. 591, 592.

(*c*) *Fordyce v. Willis*, 3 Bro. C. C. 577; *Cocks v. Smith*, 2 L. J. N. S. Ch. 205.

(*d*) *Ante*, § 1041.

(*e*) Com. Dig. Chancery, 4 W. 5.

(*f*) *Priddy v. Rose*, 3 Meriv. 102; *Page v. Broom*, 4 Russ. 6; *Wallwyn v. Coutts*,

§ 1196a. Another form in which a resulting trust may appear, is where there are certain trusts created either by will or deed, which fail in whole or in part; or which are of such an indefinite nature that courts of equity will not carry them into effect; or which are illegal in their nature and character; or which are fully executed, and yet leave an unexhausted residuum. In all such cases, there will arise a resulting trust to the party creating the trusts, or to his heirs and legal representatives, as the case may require (*g*).

§ 1196b. But it was early held, in a case where the subject is very extensively discussed by eminent judges, Lord Mansfield dissenting from the decision (*h*), that where the trusts had all failed, by the decease of the *cestui que trust*, and the grantor was also deceased, without heirs, making a case for an escheat to the Crown, or lord of the manor, if the legal title had remained in the grantor, a court of equity had no power to compel the trustee to convey the estate to the Crown, in order to perfect the right of escheat. This virtually, or rather practically (for the point was expressly left undecided), established the right of the trustee to hold the land. In consequence, probably, of the great weight of Lord Mansfield's authority in the opposite direction, the question was regarded, by the profession in Westminster Hall, for a long time, as hanging *in dubio*. But subsequent decisions of very eminent judges, finally confirmed the doctrine of the principal case in favour of the claim of the Crown (*i*). Lord Mansfield's view has since been established by statute by the Intestate Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4 (*k*).

§ 1197. Another common transaction, which gives rise to the presumption of an implied resulting use or trust, is, where a conveyance is made of land or other property without any consideration, express or implied, of any distinct use or trust stated. In such a case, the intent is presumed to be, that it shall be held by the grantee for the benefit of the grantor, as a resulting trust (*l*). But if there be an express declaration, that it is to be in trust, or for the use of another person, nothing will be presumed against such a declaration. And if there be either a good or a valuable consideration, there equity will immediately raise a use or trust correspondent to such consideration (*m*), in the absence of any controlling consideration or other circumstances.

§ 1198. This is in strict conformity to the rule of the common law, applied to resulting uses, which indeed were originally nothing but

3 Meriv. 707; s.c. 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; s.c. 2 Russ. & Myl. 451; *Leman v. Whitely*, 4 Russ. 427.

(*g*) *Stubbs v. Sargon*, 2 Keen 255; s.c. 3 Myl. & Cr. 507; *Corporation of Gloucester v. Osborn*, 1 H. L. C. 272; *In re Abbott Fund, Smith v. Abbott*, [1900] 2 Ch. 326.

(*h*) *Burgess v. Wheate*, 1 W. Bl. 133; s.c. 1 Eden Ch. 177.

(*i*) *Cox v. Parker*, 22 Beav. 168.

(*k*) See *In re Wood, Att.-Gen. v. Anderson*, [1896] 2 Ch. 596.

(*l*) *Dyer v. Dyer*, 2 Cox, 92; *Grey v. Grey*, 2 Swanst. 594; *Christy v. Courtenay*, 13 Beav. 96; *In re Orme*, 50 L. T. 51; *The Venture*, [1908] P. 218.

(*m*) See *post*, § 1199.

resulting trusts. Thus a feoffment, made without consideration, was, at a very early period of the common law, held to be made for the use of the feoffor (*n*). Lord Bacon, after repudiating a distinction set up in *Dyer*, 146*b*, assigning the origin of this doctrine to the time of the statute *quia emptores*, said: "The intendment of an use to the feoffor, where the feoffment was made without consideration, grew long after when uses waxed general; and for this reason: because, when feoffments were made, it grew doubtful whether the estates were in use or in purchase, because purchases were things notorious, and uses were things secret. The Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendments towards the use, and put the proof upon the purchaser" (*o*). Be the origin of the doctrine, however, as it may, it is firmly established in equity jurisprudence in matters of trust. And it is not in any manner affected by the provisions of the Statute of Frauds of 29 Car. 2, c. 3; for that statute contains an express exception of trusts "which shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law" (*p*).

§ 1199. The same principle applies to cases where a man makes a feoffment, or other conveyance, and parts with or limits a particular estate only, and leaves the residue undisposed of. In such a case the residue will result to the use of the feoffor or grantor, even though the feoffment or conveyance be made for a consideration. For it is the intent which guides the use; and, here, the party having expressly declared a particular estate of the use, the presumption is, that if he had intended to part with the residue, he would have declared that intention also (*q*). Where a consideration, although purely nominal, is stated in the deed, the cases fall under two categories. If no uses are declared, the grantee will take the whole use; and there will be no resulting use for the grantor; because the payment, even of a nominal consideration, shows an intent, that the grantee should have some use; and no other being specified, he must take the whole use (*r*). But, where a particular use is declared, there the undisposed of interest in the use results to the grantor; for the presumption, that the grantor meant to part with the whole use, is thereby repelled (*s*).

(*n*) 2 Black. Comm. 330; *Dyer v. Dyer*, 2 Cox 92, 93; *post*, § 1201.

(*o*) Bacon on Uses, 317.

(*p*) Co. Litt. 290 *b*, Butler's note, § 8; Bac. Abr. *Trusts* (C); *Lamplugh v. Lamplugh*, 1 P. Will. 112, 113.

(*q*) Co. Litt. 23; *Shortridge v. Lamplugh*, 2 Ld. Raym. 798; *Pybus v. Mitford*, 1 Vent. 372; *Benbow v. Townsend*, 1 Myl. & K. 506.

(*r*) *Barker v. Keete*, Freem. K. B. 24, adopting argument in *Porter's Case*, 1 Co. fo. 24.

(*s*) As the doctrine of resulting uses and trusts is founded upon a mere implication of law, it may be proper here to observe, that parol evidence is generally admissible for the purpose of rebutting such resulting use or trust. *Benbow v. Townsend*, 1 Myl. & K. 596; *post*, § 1202.

§ 1200. The same principle applies to cases where the whole of the interest in land or personalty is conveyed or given by will, but for particular objects and purposes, or on particular trusts. In all such cases, if those objects or purposes or trusts, by accident or otherwise, fail, and do not take effect; or, if they are all accomplished, and do not exhaust the whole property; there, a resulting trust will arise, for the benefit of the grantor or testator or for his heir or next of kin (*t*).

§ 1201. Upon similar grounds, where a man buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration money (*u*). This, as an established doctrine, is now not open to controversy. But there are exceptions to it, which stand upon peculiar reasons (to be presently noticed), and which are quite consistent with the general doctrine. "The clear result of all the cases, without a single exception, is" (as has been well said by an eminent judge), "that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others, without the purchaser; whether in one name or several; whether jointly or successively (*successive*), results to the man who advances the purchase-money. This is a general proposition, supported by all the cases, and there is nothing to contradict it. And it goes on a strict analogy to the rule of the common law, that, where a feoffment is made without consideration, the use results to the feoffor" (*x*). In truth, it has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter, is a matter of convenience and arrangement between the parties, for other collateral purposes. The same doctrine is applied to cases where securities are taken in the name of another person. As if A. takes a bond in the name of B., for a debt due to himself, B. will be a trustee for A. for the money (*y*).

§ 1201a. There is an exception to the doctrine of a resulting trust in favour of a purchaser, who pays the money, and takes the conveyance in the name of a third person, which stands upon a principle of public policy, and that is, that courts of equity will never raise a resulting trust, where it would contravene the provisions of a statute or would assist the parties in evading the provisions (*z*).

§ 1202. But there are other exceptions to the doctrine of a resulting or implied trust, even where the principal has paid the purchase-money,

(*t*) *Tregonwell v. Sydenham*, 3 Dow 194; *Northen v. Carnegie*, 4 Drew 587; *Childers v. Childers*, 1 De G. & J. 482; *Ramsay v. Shelmerdine*, 11 Jur. N. S. 903; *In re Abbott Fund, Smith v. Abbott*, [1900] 2 Ch. 326.

(*u*) *Rider v. Kidder*, 10 Ves. 360.

(*x*) Lord Chief Baron Eyre, in *Dyer v. Dyer*, 2 Cox 92, 93.

(*y*) *Ebrand v. Dancer*, 2 Ch. C. 26; s.c. 1 Eq. Abr. 382, pl. 11; 2 Mad. Pr. Ch. 101; *Lloyd v. Read*, 1 P. Will. 607; *Rider v. Kidder*, 10 Ves. 366.

(*z*) *Curtis v. Perry*, 6 Ves. 739. See *The Venture*, [1908] P. 218.

as has been already intimated, or, perhaps, more properly speaking, as the resulting or implied trust is, in such cases, a mere matter of presumption, it may be rebutted by the other circumstances established in evidence, and even by parol proofs, which satisfactorily contradict it (*a*). And resulting or implied trusts in such cases may, in like manner, be rebutted, as well to part of the land, as to part of the interest in the land purchased in the name of another (*b*). Thus, where A. took a mortgage in the name of B., declaring that he intended the mortgage to be for B.'s benefit, and that the principal, after his own death, should be B.'s; and A. received the interest therefor during his lifetime; it was held that the mortgage belonged to B. after the death of A. (*c*). But a more common case of rebutting the presumption of a trust is, where the purchase may be fairly deemed to be made for another from motives of natural love and affection. Thus, for example, if a parent should purchase in the name of a son, the purchase would be deemed, *primâ facie*, as intended as an advancement; so as to rebut the presumption of a resulting trust for the parent (*d*). But this presumption, that it is an advancement, may be rebutted by evidence manifesting a clear intention, that the son shall take as a trustee (*e*).

§ 1203. The moral obligation of a parent to provide for his children is the foundation of this exception, or rather of this rebutter of a presumption; since it is not only natural, but reasonable in the highest degree, to presume, that a parent, by purchasing in the name of a child, means a benefit for the latter, in discharge of this moral obligation, and also as a token of parental affection. This presumption in favour of the child, being thus founded in natural affection, and moral obligation, ought not to be frittered away by nice refinements. It is, perhaps, rather to be lamented, that it has been suffered to be broken in upon by any sort of evidence of a merely circumstantial nature.

§ 1204. The same doctrine applies to the case of securities taken in the name of a child. The presumption is, that it is intended as an advancement, unless the contrary is established in evidence (*f*). And the like presumption exists in the case of a purchase by a husband in the name of his wife, and of securities taken in her name (*g*). Indeed, the presumption was stronger in the case of a wife than of a child; for she could not formerly be the trustee for her husband.

1205. Hence, also, it is, that where a purchase is made by a father in the joint names of himself and of a child, if the father dies, the child

(a) *Dyer v. Dyer*, 2 Cox 92; *Deacon v. Colquhoun*, 2 Drew. 21.

(b) *Bow v. Townsend*, 1 Myl. & K. 506.

(c) *Ibid*.

(d) *Dyer v. Dyer*, 2 Cox 92; *Commissioner of Stamp Duties v. Byrnes*, [1911] A. C. 386.

(e) *Childers v. Childers*, 1 De G. & J. 482; *Curtis v. Worthington*, 1 Ch. D. 419.

(f) *Scawin v. Scawin*, 1 Y. & C. Ch. 65; *Christy v. Courtenay*, 13 Beav. 92; *Stock v. McAvoys*, L. R. 15 Eq. 55.

(g) *Dunbar v. Dunbar*, [1909] 2 Ch. 369.

will hold the estate, and have the benefit thereof by survivorship against the heir-at-law of the father, and against all volunteers, claiming under the father, and also against purchasers from him with notice (*h*). So, where a father transferred stock from his own name into the joint names of his son, and of a person whom the father and son employed as their banker to receive dividends, and the father told the banker to carry the dividends, as they were received, to the son's account, and they were accordingly received and enjoyed by the son during his father's lifetime; it was held, that the transfer created an executive trust for the son, and that he was absolutely entitled to the stock (*i*).

§ 1206. In the case of joint purchases made by two persons, who advance and pay the purchase-money in equal proportions and take a conveyance to them and their heirs, it constitutes a joint tenancy, that is, a purchase by them jointly of the chance of survivorship; and of course the survivor will take the whole estate. This is the rule at law; and it prevails also in equity under the same circumstances; for unless there are controlling circumstances, equity follows the law (*k*). But, wherever such circumstances occur, courts of equity will lay hold of them to prevent a survivorship and create a trust; for joint tenancy is not favoured in equity (*l*). Thus if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase-money, he will be entitled to his share as a resulting trust (*m*). So, if two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, the survivor shall not have the whole money due on the mortgage, but the representative of the deceased party shall have his proportion as a trust; for the nature of the transaction, as a loan of money, repels the presumption of an intention to hold the mortgage as a joint tenancy (*n*). So, if two persons jointly purchase an estate, and pay unequal proportions of the purchase-money, and take the conveyance in their joint names, in case of the death of either of them there will be no survivorship; for the very circumstance that they have paid the money in unequal proportions excludes any presumption that they intended to bargain for the chance of survivorship. They are, therefore, deemed to purchase, as in the nature of partners, and to intend to hold the estate in proportion to the sums which each has advanced (*o*).

(*h*) *Dyer v. Dyer*, 2 Cox, 92; *Hepworth v. Hepworth*, L. R. 11 Eq. 10. Mr. Atherley, in his Treatise on Marriage Settlements, ch. 33, pp. 473 to 484, and Mr. Sugden, in his Treatise on Vendors and Purchasers, ch. 15, § 1, 2, pp. 607 to 628 (7th edit.), have examined this whole subject with great care and ability; and the learned reader is referred to these works for a full statement of the doctrines and the cases.

(*i*) *Crabb v. Crabb*, 1 Myl. & K. 511.

(*k*) *Lake v. Gibson*, 1 Eq. Cas. Ab. 390, pl. 3, s.c. *nom.* *Lake v. Craddock*, 3 P. Wms. 158; *Robinson v. Preston*, 4 Kay, & J. 505.

(*l*) *Harrison v. Barton*, 1 J. & H. 287; *Mercier v. Mercier*, [1903] 2 Ch. 98.

(*m*) *Wray v. Steele*, 2 Ves. & B. 388.

(*n*) *Rigden v. Vallier*, 2 Ves. Sen. 258; s.c. 3 Atk. 731.

(*o*) *Lake v. Gibson*, 1 Eq. Cas. Ab. 390, pl. 3; *Lake v. Craddock*, 3 P. Wms. 158.

§ 1207. The same rule is uniformly applied to joint purchasers in the way of trade, and for the purposes of partnership, and for other commercial transactions, by analogy to, and in expansion and furtherance of, the great maxim of the common law: “*Jus accrescendi inter mercatores pro beneficio commercii locum non habet*” (*p*). In cases, therefore, where real estate is purchased for partnership purposes, and on partnership account, it is wholly immaterial in the view of a court of equity, in whose name or names the purchase is made, and the conveyance is taken; whether in the name of one partner, or of all the partners, whether in the name of a stranger alone, or of a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may (*q*), it is in equity deemed partnership property, not subject to survivorship; and the partners are deemed the *cestuis que trust* thereof (*r*). A court of law may, nay must, in general, view it only according to the state of the legal title. And if the legal title is vested in one partner, or in a stranger, a *bonâ fide* purchaser of real estate from him, having no notice, either express or constructive, of its being partnership property, will be entitled to hold it free from any claim of the partnership. But if he has such notice, then in equity he is clearly bound by the trust; and he takes it *cum onere*, exactly like every other purchaser of a trust estate (*s*).

§ 1207*a*. But although, generally speaking, whatever is purchased with partnership property, to be used for partnership purposes, is thus treated as a trust for the partnership, in whosoever name the purchase may be made; yet there may be cases in which, from the nature of the thing purchased, the partner in whose name it is purchased may, upon a dissolution of the partnership, be entitled to hold it as his own, so that it will be trust property *sub modo* only. Thus, for example, an office may be purchased, or a licence be obtained in the name of a partner out of the partnership funds (as, for example, a stockbroker's licence, or the office of a clerk in court), to be used during the continuance of the partnership for partnership purposes, by the person obtaining the same. But it will not follow, that, upon the dissolution of the partnership, such partner is to hold the same, and act as a stockbroker, or clerk in court, performing all the duties alone for the benefit of the other partners (*t*).

§ 1208. Another illustration of the doctrine of implied and resulting trusts arises from the appointment of an executor of a last will and testament. In cases of such an appointment the executor was entitled, both at law and in equity (for in this respect equity followed the law), to the whole surplus of the personal estate, after payment of all debts and

(*p*) Co. Litt. 182*a*.

(*q*) See *Maugham v. Sharpe*, 17 C. B. N. S. 443.

(*r*) *Wray v. Wray*, [1905] 2 Ch. 359.

(*s*) *Ante*, § 675; *post*, § § 1243, 1253.

(*t*) *Clarke v. Richards*, 1 Y. & C. Ex. 351, 384, 385.

charges, for his own benefit, unless it was otherwise disposed of by the testator (*u*). Courts of equity did indeed lay hold of any circumstances which might rebut the presumption of such a gift to the executor; and some very nice and curious distinctions were taken, in order to escape from the operation of the general rule. In general, it may be stated, that, at law, the appointment of an executor vested in him all the personal estate of the testator; and the surplus, after the payment of all debts and legacies, and residue so far as disposed of, belonged to him. But, in equity, if it could be collected from any circumstance or expression in the will, that the testator intended his executor to have only the office and not the beneficial interest, such intention received effect, and the executor was deemed a trustee for those on whom the law would have cast the surplus, in cases of a complete intestacy. But by the 11 Geo. IV. & 1 Will. IV., c. 40, it is provided that when any person shall die, having by will or codicil appointed any executor, such executor shall be deemed by courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto, that such executor was intended to take such residue beneficially.

§ 1209. In like manner, at law, a testator, by the appointment of his debtor to be his executor, extinguishes his debt, and it cannot be revived; although a debt due by an administrator would only be suspended. The reason of the difference is, that the one is the act of the law, and the other is the act of the party (*x*). But in equity a debt due by an executor is not extinguished so far as creditors are concerned; but as between beneficiaries and the executor debtor, a different consideration applies, for beneficiaries are volunteers, and accordingly slight circumstances are seized hold of to infer that the testator intended to release the executor from liability to account for the debt (*y*). Since the Judicature Act, 1873, the rule of equity will prevail.

§ 1211. Upon grounds of an analogous nature, the general doctrine proceeds, that, whatever acts are done by trustees in regard to the trust property, shall be deemed to be done for the benefit of the *cestui que trust*, and not for the benefit of the trustee. If, therefore, the trustee makes any contract, or does any act in regard to the trust estate for his own benefit, he will, nevertheless, be held responsible therefor to the *cestui que trust*, as upon an implied trust. Thus, for example, if a trustee should purchase a lien or mortgage on the trust estate at a discount, he would not be allowed to avail himself of the difference; but the purchase would be held a trust for the benefit of the *cestui que*

(*u*) 2 Mad. Pr. Ch. 83 to 85.

(*x*) *Hudson v. Hudson*, 1 Atk. 461.

(*y*) *Brown v. Selwin*, Cas. t. Talb. 240; *Byrn v. Godfrey*, 4 Ves. 6; *In re Pink, Pink v. Pink*, [1912] 2 Ch. 528.

trust (z). So, if a trustee should renew a lease of the trust estate, he would be held bound to account to the *cestui que trust* for all advantages made thereby (a). And, if a trustee should misapply the funds of the *cestui que trust*, the latter if adult would have an election either to take the security, or other property in which the funds were wrongfully invested, or to demand repayment from the trustee of the original funds; but if one of the beneficiaries is under disability the trustee is only accountable for the money (b).

§ 1211a. The same principle will apply to persons standing in other fiduciary relations to each other. Thus, for example, if an agent who is employed to purchase for another, purchases in his own name, or for his own account, he will be held to be a trustee of the principal at the option of another (c). And as a fiduciary relationship is established by a contract for the sale and purchase of real estate, a purchaser cannot acquire an alternative title to the property so as to defeat the rights of the vendor under the contract, while it subsists (d). Sureties who purchase up the securities of the principal in respect of debts for which they are sureties can only charge the principal with the price given for them (e).

§ 1212. In this and following sections the author glanced cursorily at the topics of conversion, and of reconversion. It is difficult to see how by the widest stretch of imagination these could be regarded as matters of implied trust, depending as they do on the character of land or money being "imperatively and definitively" affixed to the property irrespective of its actual condition (f). The main question has already been discussed in its proper place (g).

§ 1215. In the next place, we may enter upon the consideration of that class of implied trusts arising from what are properly called equitable liens; by which we are to understand such liens as exist in equity, and of which courts of equity alone take cognizance. A lien (as has been already said) (h) is not, strictly speaking, either a *jus in re* or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.

(z) *Ex parte Lacey*, 6 Ves. 626; *Ex parte James*, 8 Ves. 337; *Lawless v. Mansfield*, 1 Dru. & War. 557.

(a) *Keech v. Sandford*, Sel. Cas. Ch. 61; *James v. Dean*, 11 Ves. 392; *Giddings v. Giddings*, 3 Russ. 241.

(b) *In re Salmon*, *Priest v. Uppley*, 42 Ch. D. 351; *Power v. Banks*, [1901] 2 Ch. 487; *In re Jenkins and H. E. Randall's Contract*, [1908] 2 Ch. 362.

(c) *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196.

(d) *Murrell v. Goodyer*, 1 De G. F. & J. 432.

(e) *Reed v. Norris*, 2 Myl. & Cr. 361.

(f) *Wheldale v. Partridge*, 5 Ves. 388, 8 Ves. 227.

(g) *Ante*, § § 789 to 793.

(h) *Ante*, § 506; *Brace v. Duchess of Marlborough*, 2 P. Will. 491; *Ex parte Knott*, 11 Ves. 617.

§ 1216. At law, a lien is usually deemed to be a right to possess and retain a thing, until some charge upon it is paid or removed (*i*). There are few liens which at law exist in relation to real estate. The most striking of this sort undoubtedly was, the lien of a judgment creditor upon the lands of his debtor, given by the statute of Westminster II. But this was not a specific lien on any particular land, but it was a general lien over all the real estate of the debtor, to be enforced by an *elegit* or other legal process upon such part of the real estate of the debtor as the creditor might elect (*k*). The lien itself was treated as a consequence of the right to take out an *elegit*; and it was applied not only to present real estate in possession, but also to reversionary interests in real estate (*l*). This lien or charge upon the debtor's lands has since been abolished. In respect to personal property, a general lien is in all cases (with the exception only of certain maritime liens, such as seamen's wages, and bottomry bonds) recognized at law to exist only when it is connected with the possession of the thing itself (*m*). Where the possession is once voluntarily parted with, or is to be temporary, the lien is, at law, gone (*n*). Thus, for example, the lien on goods for freight, the lien for the repairs of domestic ships, and the lien on goods for a balance of accounts, are all extinguished by a voluntary surrender of the thing to which they are attached (*o*). Liens at law generally arise, either by the express agreement of the parties, or by the usage of trade, which amounts to an implied agreement, or by mere operation at law (*p*).

§ 1216a. In enforcing liens at law, courts of equity are, in general, governed by the same rules of decision as courts of law, with reference to the nature, operation, and extent of such liens (*q*). But in some special cases, courts of equity will give aid to the enforcement and satisfaction of liens in a manner utterly unknown at law. Thus, where there is a specialty debt, binding the heirs, and the debtor dies, whereby a lien attaches upon all the lands descended in the hands of his heir, courts of equity will interfere in aid of the creditor, and, in proper cases, accelerate the payment of the debt by decreeing a sale and applying the proceeds in paying creditors the amount of their demand (*r*). At law the creditor could only take out execution against the whole lands, and hold them, as he would under an *elegit*, until the debt was fully paid (*s*).

(*i*) *Ante*, § 506; *Ex parte Heywood*, 2 Rose, Cas. 355, 357.

(*k*) *Averall v. Wade*, Ll. & G., t. Sugd. 252.

(*l*) Gilbert on Executions, 38, 39; 2 Tidd on Practice (9th edit.), 1084.

(*m*) *Jackson v. Cummins*, 5 M. & W. 737; *Dodsley v. Varley*, 12 Ad. & Ell. 632; *Shaw v. Neale*, 6 H. L. C. 581.

(*n*) *Hartley v. Hitchcock*, 1 Stark. 408; *Hatton v. Car Maintenance Co., Ltd.*, [1915] 1 Ch. 621.

(*o*) *Ex parte Bland*, 2 Rose, 91.

(*p*) *Post*, § 1240.

(*q*) *Gladstone v. Birley*, 2 Meriv. 403; *Oxenham v. Esdaile*, 2 Y. & Jerv. 493.

(*r*) *Ante*, § 628.

(*s*) Bac. Abr. Heir and Ancestor, H. 1, 2 Tidd's Prac. (9th edit.), pp. 936 to 938.

But courts of equity will go farther, and decree a sale of the inheritance in order to accelerate the payment of the debt, if it cannot otherwise be satisfied within a reasonable period. The same doctrine is applied to reversions after an estate for life, and even after an estate tail; for they will be decreed to be sold to satisfy a bond debt of the ancestor, which binds the heir, in order to accelerate the payment of the debt (*t*). And, indeed, courts of equity have, in the case of advowsons, gone farther; and have decreed an advowson in gross to be sold to satisfy a bond creditor; holding such an advowson to be assets at law, even if not extendible on an *elegit* (*u*).

§ 1217. But there are liens recognized in equity, whose existence is not known or obligation enforced at law, and in respect to which courts of equity exercise a very large and salutary jurisdiction (*x*). In regard to these liens, it may be generally stated, that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached, as a charge or incumbrance; and they can be enforced only in courts of equity (*y*). The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached (*z*). Of this we have a strong illustration in the well-known doctrine of courts of equity, that the vendor of land has a lien on the land for the amount of the purchase-money, not only against the vendee himself, and his heirs, and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid (*a*). Conversely, the purchaser acquires a lien upon the land in respect of all payments made by him under the contract, and this lien is available against all persons claiming under the vendor otherwise than as purchaser for value without notice of the lien (*b*). And this is rested upon a fiduciary relationship established by the contract for sale of which many examples can be given (*c*).

§ 1218. This lien of the vendor of real estate for the purchase-money is wholly independent of any possession on his part; and it attaches to the estate, as a trust, equally, whether it be actually conveyed, or only be contracted to be conveyed. It has often been objected, that the creation of such a trust by courts of equity is in contravention of the policy of the Statute of Frauds. But, whatever may be the original force of such an objection, the doctrine is now too firmly established to

(*t*) *Tyndale v. Warre*, Jac. 212.

(*u*) *Robinson v. Tonge*, 3 P. Will. 308; 1 Bro. P. C. 114. See *Tyndale v. Warre*, Jac. 212, where Sir Thomas Plumer held, that an advowson in gross was not assets at law, but still, if not, it was assets in equity.

(*x*) *Gladstone v. Birley*, 2 Meriv. 403.

(*y*) See *ante*, § 1047.

(*z*) *Neate v. Duke of Marlborough*, 3 Myl. & Cr. 407, 415.

(*a*) *Machreth v. Symmons*, 15 Ves. 329.

(*b*) *Rose v. Watson*, 10 H. L. C. 672; *Whitehead & Co., Ltd. v. Watt*, [1902] 1 Ch. 835.

(*c*) *Eq. Murrell v. Goodyer*, 1 De G. F. & J. 432; *Phillips v. Silvester*, L. R. 8 Ch. 173; *Clarke v. Ramuz*, [1891] 2 Q. B. 456.

be shaken by any mere theoretical doubts (*d*). Courts of equity have proceeded upon the ground, that the trust, being raised by implication, is not within the purview of that statute; but is excepted from it. It is not, perhaps, so strong a case as that of a mortgage implied by a deposit of the title-deeds of real estate, which seems directly against the policy of the statute, but which, nevertheless, has been unhesitatingly sustained (*e*).

§ 1219. The principle upon which courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money. A third person, having full knowledge that the estate had been so obtained, ought not to be permitted to keep it without making such payment; for it attaches to him, also, as a matter of conscience and duty. It would otherwise happen that the vendee might put another person into a position better than his own, with full notice of all the facts (*f*).

§ 1220. It has been sometimes suggested, that the origin of this lien of the vendor might be attributed to the tacit consent or implied agreement of the parties. But, although in some cases it may be perfectly reasonable to presume such a consent or agreement, the lien is not, strictly speaking, attributable to it, but stands independently of any such supposed agreement (*g*). On other occasions the lien has been treated as a natural equity, having its foundation in the earliest principles of courts of equity (*h*). Thus, it has been broadly contended, that, according to the law of all nations, the absolute dominion over property sold is not acquired by the purchaser until he has paid the price, or has otherwise satisfied it, unless the vendor has agreed to trust to the personal credit of the buyer (*i*). For a thing may well be deemed to be unconscientiously obtained, when the consideration is not paid (*k*). Upon this ground the Roman law declared the lien to be founded in natural justice. “Tamen rectè dicitur, et jure gentium, id est, jure naturali, id effici” (*l*). And, therefore, when courts of equity estab-

(*d*) *Mackreth v. Symmons*, 15 Ves. 339.

(*e*) *Ante*, § 1020.

(*f*) See *Mackreth v. Symmons*, 15 Ves. 340, 347, 349.

(*g*) *Nairn v. Prowse*, 6 Ves. 752.

(*h*) *Chapman v. Tanner*, 1 Vern. 267, 268; *Blackburne v. Gregson*, 1 Bro. C. C. 424.

(*i*) By Mr. Scott and Mr. Mitford, in argument, in *Blackburne v. Gregson*, 1 Cox 94.

(*k*) *Hughes v. Kearney*, 1 Sch. & Lefr. 135. It was formerly doubted, in consequence of an expression which fell from Lord Hardwicke, in *Pollexfen v. Moore*, 3 Atk. 273, whether this lien of the vendor could exist in favour of a third person; as, for example, if the vendor, having such a lien, should exhaust the personal estate of the deceased purchaser, whether legatees should have a right to stand in his place against the real estate in the hands of the heir, as upon the marshalling of the assets. That doubt is now removed, and the affirmative established in *Selby v. Selby*, 4 Russ. 336. See Locke King's Act, 1877 (40 & 41 Vict. c. 34).

(*l*) Inst. Lib. 2, tit. 1, § 41.

lished the lien as a matter of doctrine, it had the effect of a contract, and the lien was held to prevail, although, perhaps, no actual contract had taken place (*m*).

§ 1221. The true origin of the doctrine may, with high probability, be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England (*n*). By the Roman law, the vendor of property sold had a privilege, or right of priority of payment, in the nature of a lien on the property, for the price for which it was sold, not only against the vendee and his representatives, but against his creditors, and also against subsequent purchasers from him. For it was a rule of that law, that, although the sale passed the title and dominion in the thing sold; yet it also implied a condition, that the vendee should not be of the thing so sold, unless he had paid the price, or had otherwise satisfied the vendor in respect thereof, or a personal credit had been given to him without satisfaction. “*Quod vendidi*” (said the Digest), “*non aliter fit accipientis quam si aut pretium nobis solutum sit aut satis eo nomine factum; vel etiam fidem habuerimus emptori sine ullâ satisfactione*” (*o*). *Ut res emptoris fiat, nihil interest, utrum solutum sit pretium, an eo nomine fidejussor datus sit*” (*p*). The doctrine was still more explicitly laid down in the Institutes: “*Venditæ vero res, et traditæ, non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit; veluti expromissore aut pignore dato. Sed, si is, qui vendidit, fidem emptoris sequutus fuerit, dicendum est, statim rem emptoris fieri*” (*q*). The rule was equally applied to the sale of movable and of immovable property; and equally applied, whether there had been a delivery of possession to the vendee or not. If there was no such delivery of possession, then the vendor might retain the property as a pledge, until the price was paid. If there was such a delivery of possession, then the vendor might follow the property into the hands of any person, to whom it had been subsequently passed, and reclaim it or the price (*r*). “*Venditor enim, quasi pignus, retinere potest eam rem, quam vendidit*” (*s*). And a part payment of the price did not exonerate the property from the privilege or lien for the residue. “*Hæreditatis venditæ pretium pro parte accepit*” (said the Digest, quoting Scævola), “*reliquum emptore non solvente; quæsitum est, an corpora hæreditaria pignoris nomine teneantur? Respondi; nihil proponi, cur non teneantur*” (*t*).

(*m*) *Mackreth v. Symmons*, 15 Ves. 329, 337.

(*n*) *Mackreth v. Symmons*, 15 Ves. 329, 344.

(*p*) *Ibid.* f. 53.

(*r*) *Ibid.* The same rule exists in the French law in regard to immovables. But in regard to movables, when delivered to the vendee, there is no sequel (as it is phrased in the French law) by way of privilege or lien against the property, except while it remains in the hands of the purchaser. If he has sold it, the right of privilege or lien for the price is gone. 1 Domat, B. 3, tit. 1, § 5, art. 4, and note.

(*s*) *Id.* Dig. Lib. 19, tit. 1, f. 13, § 8.

(*t*) Dig. Lib. 18, tit. 4, f. 22; Pothier, Pand. Lib. 19, tit. 1, n. 5.

(*o*) Dig. Lib. 18, tit. 1, f. 19.

(*q*) Inst. Lib. 2, tit. 1, § 41.

§ 1222. This close analogy, if not this absolute identity, of the English doctrine of the lien of the vendor with that of the Roman law of privilege on the same subject, seems to demonstrate a common origin; although in England the lien is confined to cases of the sale of immovables, and it does not extend to movables, apart from the right to stop while the goods are *in transitu*, where there has been a transfer of possession (*u*). As regards equitable interests in settled stocks and funds, a vendor's lien may exist (*x*). But in this case the matter is of slight importance in practice owing to the determination of rights by priority by notice (*y*). There are, however, some exceptions from the doctrine in each law, founded upon the same general principle, but admitting of some diversity in respect to its practical application.

§ 1223. We have seen that the lien by the Roman law ceased (1) where the price was actually paid; (2) where anything was taken in satisfaction of the price, although payment had not been positively made; (3) where a personal credit was given to the vendee, excluding any notion of a lien; "Aut pretium nobis solutum sit" (said the Digest); "aut satis eo nomine factum; vel etiam fidem habuerimus emptori sine ullâ satisfactione" (*z*). Pothier has deduced the conclusion, that, in the civil law, the question, whether a personal credit was given to the vendee or not, was to be judged of by all the circumstances of the case. Whenever it was doubtful whether such credit was given or not, there it was not to be presumed, unless made certain by the vendee (*a*). In every other case, either a payment or a satisfaction of the price was necessary to discharge the property. The giving of a pledge or security for the price was deemed equivalent to payment. "Qualibet ratione, si

(*u*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sect. 39, sub-s. 1 (*a*), sect. 43. See *McGruther v. Pitcher*, [1904] 2 Ch. 306.

(*x*) *In re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67.

(*y*) *Davies v. Thomas*, [1900] 2 Ch. 462.

(*z*) Dig. Lib. 18, tit. 1, f. 19; Inst. Lib. 2, tit. 1, § 41. Vinnius distinguishes between a payment and a satisfaction. "Satisfaciendi verbum generalius est, quam solvendi. Qui solvit, utique et satisfacit; at non omnis satisfactio solutio est. Satisfacit, et qui non liberatur; veluti, si quis fidejussorem vel pignora det; solutione vero obligatio tollitur." Vinnius also says, that a personal credit, given to the vendor, without satisfaction, is a waiver of the lien. For, commenting on the words of the Institute, Sed si is, qui vendidit, fidem emptoris sequutus fuerit, he says: "Id est, fidem emptori de pretio habuerit sine ullâ satisfactione." What will amount to such personal credit, he adds, depends on circumstances, but an agreement for postponement of payment to a future day would be such a personal credit and would discharge the lien. "Quod ex circumstantiis æstimandum; veluti, si, dies, solutioni dicta sit." And for this he cites the Code. (Cod. Lib. 4, tit. 54, l. 3.) He then proceeds: "Aut si, cum emptor, pecuniam ad manum non haberit, venditor dixerit; I, licet; nunc non requiro; postea dabis." Vinn. ad. Inst. Lib. 2, tit. 1, § 41, Comm. (2).

(*a*) Pothier, Pand. Lib. 41, tit. 1, note 60. In this position Vinnius agrees with Pothier, contrary to what is held by some other jurists. "In dubio, qui rem emptori tradit, non videtur equi fidem emptoris, nisi emptor contrarium doceat." Vinn. ad. Inst. Lib. 2, tit. 1, § 41; Comm. (3).

venditori de pretio satisfactum est, veluti, expromissore aut pignore dato, proinde sit, ac si pretium solutum esset" (b).

§ 1224. Now, the same principle is applied in English jurisprudence. Generally speaking, the lien of the vendor exists; and the burden of proof is on the purchaser to establish, that, in the particular case, it has been intentionally displaced, or waived by the consent of the parties (c). If, under all the circumstances, it remains in doubt, then the lien attaches. The difficulty lies in determining what circumstances are to be deemed sufficient to repel or displace the lien, or to amount to a waiver of it. And, upon the authorities, this is left in such a state of embarrassment, that a learned judge has not hesitated to say, that it would have been better at once to have held, that the lien should exist in no case, and that the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not exist (d). At present, that certainty cannot be generally affirmed.

§ 1225. In the first place, it seems, that, if, upon the face of the conveyance, the consideration is expressed to be paid, and even if a receipt therefore is indorsed upon the back of it, and yet, in point of fact, the purchase-money has not been paid, the lien is not gone; but it attaches against the vendee and all persons claiming as volunteers, or with notice under him (e).

§ 1226. The taking of a security for the payment of the purchase-money is not, in itself, as it was in the Roman law, a positive waiver or extinguishment, of the lien (f). It is, perhaps, to be regretted, that it has not been so held; as when a rule so plain is once communicated, if the vendor should not take an adequate security, he would lose his lien by his own fault. But the taking a security has been deemed, at most, as no more than a presumption, under some circumstances, of an intentional waiver of the lien; and not as conclusive of the waiver. And if a security is taken for the money, the burden of the proof has been adjudged to lie on the vendee to show, that the vendor agreed to rest on that security, and to discharge the land (g). Nay, even the taking of a distinct and independent security, as, for instance, of a mortgage on another estate, or of a pledge of other property, has

(b) Dig. Lib. 18, tit. 1, f. 53; Pothier, Pand. Lib. 41, tit. 1, n. 60; Inst. Lib. 2, tit. 1, § 41.

(c) *Nairn v. Prowse*, 6 Ves. 752; *Hughes v. Kearney*, 1 Sch. & L. 132; *Mackreth v. Symmons*, 15 Ves. 329.

(d) Lord Eldon in *Mackreth v. Symmons*, 15 Ves. 329, 340.

(e) *Mackreth v. Symmons*, 15 Ves. 329; *Worthington v. Morgan*, 16 Sim. 547; *Frail v. Ellis*, 16 Beav. 350.

(f) *Mackreth v. Symmons*, 15 Ves. 329.

(g) *Hughes v. Kearney*, 1 Sch. & L. 132; *Saunders v. Leslie*, 1 Ball & B. 514; *Frail v. Ellis*, 16 Beav. 350. As examples of cases in which it has been held that the lien was waived, see *Cood v. Pollard*, 9 Price 544, 10 Price 109; *Capper v. Spottiswoode*, Tambl. 4.

been deemed not to be conclusive evidence that the lien is waived (*h*). The taking of bills of exchange drawn on and accepted by a third person, or by the purchaser and a third person, has also been deemed not to be a waiver of the lien, but to be merely a mode of payment (*i*). And it has been laid down as clear doctrine, that, in general, where a bill, note, or bond is given for the whole or a part of the purchase-money, the vendor does not lose his lien for so much of the purchase-money as remains unpaid, even though it is secured to be paid at a future day, or not until after the death of the purchaser (*k*). And if the purchase-money is by agreement to be paid in instalments, the vendor will be at liberty to apply to the court for a declaration that his lien extends to future instalments when they become due (*l*). But the right to lien may be lost by the contract between vendor and purchaser being of such a nature as to exclude it (*m*).

§ 1227. The lien of the vendor is not confined to himself alone; but, in case of his death, it extends to his personal representatives (*n*). It may also be enforced in favour of a third person, notwithstanding a decision of Lord King and the doubts formerly expressed by Lord Hardwicke, even in favour of legatees (who are volunteers) under the practice of marshalling (*o*). And Locke King's Act, 1877, now provides that any lien for unpaid purchase-money shall be satisfied by the person to whom the estate descended or was devised, unless the vendor shall in the manner prescribed by the Act have signified a contrary intention.

§ 1228. We have already had occasion to state, that the lien of the vendor exists against the vendee and against volunteers, and purchasers under him with notice, having an equitable title only (*p*). But it does not exist against purchasers under a conveyance of the legal estate made *bonâ fide*, for a valuable consideration without notice, if they have paid the purchase-money (*q*). The lien will also prevail against parties having no better title than the purchaser, as trustees in bankruptcy (*r*), or judgment creditors (*s*). So, it will prevail against a judgment creditor of the vendee before an actual conveyance of the

(*h*) *Frail v. Ellis*, 16 Beav. 350.

(*i*) *Grant v. Mills*, 2 Ves. & B. 306; *Ex parte Peake*, 1 Mad. 346.

(*k*) *Winter v. Lord Anson*, 3 Russ. 488; *Collins v. Collins*, 31 Beav. 346.

(*l*) *Matthew v. Bowler*, 6 Hare 110; *Nives v. Nives*, 15 Ch. D. 649.

(*m*) *Cood v. Pollard*, 9 Price, 544, 10 Price, 109; *Capper v. Spottiswoode*, Tambl. 21; *In re Brentwood Brick and Coal Company*, 4 Ch. D. 562.

(*n*) *Ante*, § 788 to 791, 1216, 1217.

(*o*) *Selby v. Selby*, 4 Russ. 336; *Sproule v. Prior*, 8 Sim. 189; *Lord Lilford v. Powys Keck*, L. R. 1 Eq. 347.

(*p*) *Worthington v. Morgan*, 16 Sim. 547; *Frail v. Ellis*, 16 Beav. 350.

(*q*) *Ante*, § 788, 789; 2 Mad. Ch. Pr. 105, 106; *Cator v. Bolingbroke*, 1 Bro. Ch. C. 302; *Mackreth v. Symmons*, 15 Ves. 329; *Rice v. Rice*, 2 Drew. 73.

(*r*) *Blackburne v. Gregson*, 1 Bro. C. C. 420, by Belt; Sugden, *Vendors and Purchasers*, ch. 12, § 3, p. 557 (7th edit.); *Grant v. Mills*, 2 Ves. & B. 306; *Ex parte Peake*, 1 Mad. 356.

(*s*) *Fawell v. Heelis*, Ambler 726.

estate has been made to him (*t*); and as it should seem, also against such a judgment creditor after the conveyance; for each party, as a creditor, would have a lien on the estate sold, with an equal equity, and, in that case, the maxim applies, “*Qui prior est in tempore, potior est in jure.*”

§ 1229. But there is a clear distinction between the case of such a general assignment to assignees for the benefit of creditors generally and a particular assignment to specified creditors for their particular security or satisfaction. The former are deemed to take as mere volunteers, and not as purchasers for a valuable consideration, strictly so called (*u*). The latter, if a conveyance of the property has been actually made, and they have no notice of the purchase-money being unpaid to the vendor, are deemed entitled to the same equities as any other *bonâ fide* particular purchasers (*x*).

§ 1230. Liens of an analogous nature may be created by a deposit of title-deeds, as a security for advance of money, thus constituting an equitable mortgage on the estate included in the title-deeds. But this subject has been already considered in a previous part of these Commentaries (*y*).

§ 1231. So, liens may be created on the purchase-money due on the sale of an estate, in favour of a vendee, if it is agreed that, the money shall be deposited in the hands of a third person, to be applied in discharge of prior incumbrances, to the extent of such incumbrances (*z*). Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons, who are volunteers, or have notice. For it is a general principle in equity, that, as against the party himself, and any claiming under him, voluntarily, or with notice, such an agreement raises a trust (*a*). Thus, for example, if a tenant for life of real estate, should, by a covenant, agree to set apart, and pay the whole, or a portion of the annual profits of that estate to trustees for certain objects, it would create a lien, in the nature of a trust, on those profits against him, and all persons, claiming as volunteers, or with notice under him (*b*). When the author wrote there was authority for the proposition that a general lien could be created over realty by a covenant to settle

(*t*) *Finch v. Earl of Winchelsea*, 1 P. Will. 278.

(*u*) *Brown v. Heathcote*, 1 Atk. 159; *Worrall v. Marlar*, cited in Mr. Cox's notes to 1 P. Will. 459; Com. Dig. *Bankrupt*, D. 19; *Scott v. Surman*, Willes 402, and the Register's note; *ante*, § 1038, 1411.

(*x*) *Mitford v. Mitford*, 9 Ves. 100.

(*y*) *Ante*, § 1020.

(*z*) *Farr v. Middleton*, Prec. Co. 174.

(*a*) *Collyer v. Fallon*, 1 Turn. & Russ. 459; *Legard v. Hodges*, 1 Ves. Jun. 478; *ante*, § 1039 to 1058; *Dodsley v. Varley*, 12 Adolph. & Ell. 632.

(*b*) *Legard v. Hodges*, 1 Ves. Jun. 478.

lands of a certain value or to secure an annuity by a charge upon lands or by investment in the funds or by the best means in the covenantor's power, but it is now settled that no charge or lien can be established unless the property which is to form the security is identified, or the option of choice of security taken from the covenantor (c).

§ 1231*b*. The owner of land taken by a railway for the purpose of its construction still retains a lien upon the land for the unpaid price, even after the railway has gone into operation, to be enforced by a sale and the appointment of a receiver, the right of the purchaser being paramount to that of the public (d).

§ 1232. Upon similar principles, where a vendee has sold the estate to a *bona fide* purchaser without notice, if the purchase-money has not been paid, the original vendor may proceed against the estate for his lien, or against the purchase-money in the hands of such purchaser for satisfaction; for in such a case the latter, not having paid his money, takes the estate *cum onere*, at least to the extent of the unpaid purchase-money. And this proceeds upon a general ground, that, where trust-money can be traced, it shall be applied to the purposes of the trust (e).

§ 1233. But, although a lien will be created in favour of a vendor for the purchase-money on the sale of an estate; yet, if the consideration of the conveyance is a covenant to pay an annuity to the vendor, and another covenant to pay a part of the money to third persons, it seems that the latter, not being parties to the conveyance, will not, generally, have any lien thereon, for the payment of such money; for they stand in no privity to establish a lien, at least unless the original agreement import an intention to create such a lien (f).

§ 1234. Another species of lien is that which results to one joint owner of any real estate, or other joint property, from repairs and improvements made upon such property for the joint benefit, and for disbursements touching the same. This lien, as we shall presently see, sometimes arises from a contract, express or implied, between the parties, and sometimes it is created by courts of equity, upon mere principles of general justice, especially where any relief is sought by the party, who ought to pay his proportion of the money expended in such repairs and improvements; for in such cases, the maxim well applies, "*Nemo debet locupletari ex alterius incommodo*" (g).

(c) *Countess of Mornington v. Keane*, 2 De. G. & J. 292.

(d) *Walker v. Ware, Hadham, and Buntingford Ry.*, L. R. 1 Eq. 195; *Munns v. Isle of Wight Ry.*, L. R. 5 Ch. 414.

(e) See *Lench v. Lench*, 10 Ves. 511; *Ex parte Morgan*, 12 Ves. 6; *Poole v. Adams*, 33 L. J. Ch. 639; *post*, §§ 1255 to 1262.

(f) *Clark v. Royle*, 3 Sim. 499; *Foster v. Blackstone*, 1 Myl. & K. 297; *Colyear v. Countess of Mulgrave*, 2 Keen 81, 98; *ante*, § 1227.

(g) *Jenkins's Cent.* 4; *post*, § 1237; *Dig. Lib.* 50, tit. 17, f. 206.

§ 1235. At the common law, if there are two tenants in common, or joint tenants of a house or mill, and it should fall into decay, and the one is willing to repair and the other is not; he that is willing to repair shall have a writ *de reparatione faciendâ*; for owners are bound, *pro bono publico*, to maintain houses and mills, which are for the habitation and use of man (*h*). It is not, perhaps, quite certain, from the manner in which this doctrine is laid down, whether the writ applied merely to repairs on other things, constituting real estate, or appurtenant thereto. But it seems clear, that the word "repairs" is used in a sense different to what it bears at the present day, and that it extends to an expenditure necessary to prevent the house from going to ruin (*i*), or permanent improvements (*k*).

§ 1236. But the doctrine of contribution in equity is larger than it is at law. Thus, for example, it has been held, that if two or more persons make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this will be a lien on the land, and a trust for the representatives of him who advanced it (*l*). This depends upon the analogy of a partnership (*m*).

§ 1237. The whole subject was considered and the authorities reviewed in recent times, and the principle established by the cases negatives a general right of lien from the mere fact of a right of contribution (*n*). There is no principle analogous to a claim for maritime salvage at the common law or in equity (*o*). A trustee or person in a fiduciary position is entitled to an indemnity for an expenditure in preserving the trust property, and may transfer this right to a person who advances the money at his request, but short of this there is no lien (*p*). The only apparent exception is the right of a defendant in a partition action to be recouped out of the property the value (estimated at the time of action, and not exceeding the sum actually expended) of permanent improvements. He who seeks equity must do equity (*q*). When a fiduciary relation is established, a party in the position of a trustee may claim a lien for his expenditure or at least a part of it. Thus, where a tenant for life under a will, has gone on to finish improvements, permanently beneficial to an estate, which were begun by the testator, courts of equity have deemed the expenditure

(*h*) Co. Litt. 200 b; Fitzherbert, N. B. p. 127.

(*i*) *Kay v. Johnston*, 21 Beav. 536; *Leigh v. Dickeson*, 15 Q. B. D. 60.

(*k*) *In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461.

(*l*) *Lake v. Cradock*, 1 Eq. Abr. 291; s.c. 3 P. Will. 158.

(*m*) See *Kay v. Johnston*, 21 Beav. 536; *In re Leslie, Leslie v. French*, 23 Ch. D. 552.

(*n*) *In re Leslie, Leslie v. French*, 23 Ch. D. 552.

(*o*) *Nicholson v. Chapman*, 2 H. Bl. 254; *In re Leslie, Leslie v. French*, 23 Ch. D. 552; *Falcke v. Scottish Imperial Insurance Society*, 34 Ch. D. 234.

(*p*) *In re Leslie, Leslie v. French*, 23 Ch. D. 552.

(*q*) *Swan v. Swan*, 8 Price, 518; *In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461.

(so far as they were not attributable to ordinary repairs) a charge, for which the tenant is entitled to a lien (r).

§ 1239. The civil law seems to have proceeded upon a far broader principle of natural justice. For, by that law, any *bonâ fide* possessor, as, for instance, a creditor, who had laid out money in preserving, repairing, or substantially improving an estate, was allowed a privilege or lien for such meliorations. “Creditor qui ob restitutionem ædificiorum crediderit, in pecuniam, quam crediderit, privilegium exigendi habebit (s). Pignus insulæ, creditori datum, qui pecuniam ob restitutionem ædificii exstruendi mutuam dedit, ad eum quoque pertinebit, qui redemptori, domino mandante, nummos ministravit” (t). Indeed, Domat lays it down, as a general doctrine, that those whose money has been laid out on improvements of an estate, such as making a plantation, or erecting buildings upon it, or augmenting the apartments of a house, or for other like causes, have, by the civil law, a privilege upon those improvements, as upon a purchase with their own money (u).

§ 1240. In the first place, in respect to repairs, improvements, and disbursements upon personal property. Here the civil law gave a privilege or lien upon the thing in favour of all artificers and other persons, who had laid out their money in such meliorations. Thus, it is said: “Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel instruendæ, causâ, vel quoquo modo crediderit, vel ob navem venditam petat, habet privilegium post fiscum” (x). But there is no such privilege or lien recognized in English law.

§ 1242. Upon another point, some diversity of judgment has been expressed; and that is, how far, as between part-owners, a lien exists on the ship itself for any expenses incurred by one or more of them beyond their shares in building, repairing, or fitting out the ship upon a joint voyage (y). In respect to the proceeds of the joint adventure on the voyage, no doubt seems to be entertained that they are liable to the disbursements and charges of the outfit, in the nature of a lien, and therefore, that no part-owner can take any portion of the profits, until after such expenditures are paid and deducted. In this respect the part-owners are treated as partners in the joint adventure. But the point, whether the ship itself is liable for such expenditures, as constituting a lien on it, turns upon somewhat different considerations. Lord Hardwicke held, that the ship was so liable; and that the part-owners of a ship, although tenants in common, and not joint-tenants,

(r) *Hibbert v. Cooke*, 1 Sim. & St. 552.

(s) Dig. Lib. 12, tit. 1, f. 25; 1 Domat, B. 3, tit. 1, § 5, arts. 5, 7; *Bright v. Boyd*, 1 Story, 478, 494 to 497.

(t) Dig. Lib. 20, tit. 2, f. 1; 1 Domat, B. 3, tit. 1, § 5, arts. 5 to 7; *ante*, § 1237, note.

(u) 1 Domat, B. 3, tit. 1, § 5, art. 7; *ante*, § 1237, note.

(x) Dig. Lib. 42, tit. 5, ff. 34, 36; 1 Domat, B. 3, tit. 1, § 5, arts. 7, 9; Story, Comm. on Agency, § § 355 to 357; *ante*, § 506.

(y) *Ex parte Bland*, 3 Rose, 91; *Stewart v. Hall*, 2 Dow, 29.

have a right, notwithstanding, to consider the chattel as used in partnership, and liable, as partnership effects, to pay all debts whatever, to which any of them are liable on account of the ship (*z*). Lord Eldon has expressed a directly contrary opinion; and has held the ship not to be liable for such expenditures (*a*).

§ 1243. Another species of tacit or implied trust, or, perhaps, strictly speaking, of tacit or implied pledge or lien, is that of each partner in and upon the partnership property, whether it consists of lands, or stock, or chattels, or debts, as his indemnity against his joint debts, as well as his security for the ultimate balance due to him for his own share of the partnership effects. We have already had occasion to allude to this sort of lien (*b*), in considering joint purchases in the name of one partner; and it is only necessary here to refer to it in this more general form.

§ 1244. Another class of implied liens or trusts arises, where property is conveyed *inter vivos*, or is bequeathed or devised by last will and testament, subject to a charge for the payment of debts, or to other charges in favour of third persons. In such cases, although the charge is treated, as between the immediate parties to the original instrument, as an express trust in the property, which may be enforced by such parties or their proper representatives; yet, as between the trustee and *cestuis que trust*, who are to take the benefits of the instrument, it constitutes an implied or constructive trust only; a trust, raised by courts of equity in their favour, as an interest *in rem*, capable of being enforced by them directly by a suit brought in their own names and right. Thus, for example, if a devise is made of real estate, charged with the payment of debts generally, it may be enforced by any one or more creditors against the devisee, although there is no privity of contract between him and them (*bb*).

§ 1245. There is, also, a distinction between a devise of an estate in trust to pay debts and other charges, and a devise of an estate charged with, or subject to, debts or other charges. In the former case, the devise is construed to be a mere trust to pay the debts or other charges, giving no beneficial interest to the devisee, but holding him, after the debts and charges are paid, a mere trustee for the heir, as to the residue. In the latter case, the devise is construed to convey the whole beneficial interest to the devisee, subject only to the payment of the debts, or other charges. The distinctions may seem nice; but it is clearly established as a matter of intention (*c*).

(*z*) *Doddington v. Halkett*, 1 Ves. Sen. 497, and Belt's supp. 205, 206.

(*a*) *Ex parte Younge*, 2 Ves. & B. 242.

(*b*) *Ante*, § 1207; *post*, § 1253. See also *ante*, §§ 674, 675.

(*bb*) *King v. Dennison*, 1 Ves. & B. 260, 272. See also the case of creditors' trust deeds, *ante*, § 1046, as an illustration of the principle as applied to transactions *inter vivos*.

(*c*) *King v. Denison*, 1 Ves. & B. 260; *In re West, George v. Grose*, [1900] 1 Ch. 80.

§ 1246. In this paragraph the learned author referred to the construction of words operative to create a charge of debts. In England the matter was changed from one of substance to one of form, when real estate became liable to the payment of all debts. In more recent times, as already noticed, questions of form were modified until the only point of practical importance to be considered is whether the primary liability of the personal estate to discharge debts (*d*) is displaced. Debts which are charges upon realty must now be paid by the devisee as between him and the other beneficiaries, by force of the Locke King's Acts, 1854, 1867, 1877.

§ 1247. The principal exception to this doctrine of the primary liability of the personal estate seems to be where the testator, after generally directing his debts to be paid (without charging any funds expressly), has provided or pointed out a specific realty or a specific fund for that purpose (*e*); upon the ground of presumed intention in the testator. If the testator assigns a specific fund for the payment of his debts, that (naturally enough) is construed to exclude any intention to appropriate a more general fund for the same purpose; "Expressio unius est exclusio alterius."

§ 1248. Another class of implied liens or trusts arises, or rather is continued by implication, where a party, who takes an estate which is already subject to a debt, or other charge, makes himself personally liable by his own express contract or covenant for the same debt or charge. In such a case the original lien or charge is not only displaced thereby, but the real estate is treated throughout as the primary fund. So that, in case of the death of the debtor, as between his heirs, devisees, and distributees, the debt, if paid out of his personal assets, will still be deemed a primary charge upon the real estate; and, as such, followed in favour of creditors, legatees, and others entitled to the personal assets (*f*). Thus, for example, where a settlor, upon a marriage settlement, created a trust term in his real estate for the raising of portions, and also covenanted to pay the amount of the portions; it was held to be a charge primarily on the real estate; and the personal estate to be auxiliary only. On that occasion it was said, by the Master of the Rolls (Sir William Grant), "It is difficult to conceive, how a man can make himself a debtor (although by the same instrument he charges the real estate), without subjecting his personal assets in the first instance to the payment of the debt. Here the settlor certainly makes himself a debtor by his covenant. Where a person becomes entitled to an estate subject to a charge, and then covenants

(*d*) *Tower v. Lord Rous*, 18 Ves. 132; *Bootle v. Blundell*, 1 Mer. 193; *Wells v. Row*, 48 L. J. Ch. 476.

(*e*) *Webb v. Jones*, 1 Cox 245; s.c. 2 Bro. C. C. 60; *Clutterbuck v. Clutterbuck*, 1 Myl. & K. 15; *Forrest v. Prescott*, L. R. 10 Eq. 545.

(*f*) *Loosemore v. Knapman*, Kay, 123.

to pay it, the charge still remains primarily on the real estate; and the covenant is only a collateral security; because the debt is not the original debt of the covenantor" (g).

§ 1249. It may now be considered as the settled rule that a covenant by a settlor, to convey and settle lands (not specifying any in particular), will not constitute a specific lien on his lands; and the covenantee will be deemed a creditor by specialty only (h). But in some cases of this sort in favour of a dowress, courts of equity have established a lien upon real property, by what has been called a very subtle equity, where, perhaps, it would be difficult to maintain it in ordinary cases. Thus, where a man before marriage gave a bond to convey sufficient freehold or copyhold estates to raise £600 per annum for his intended wife, in bar of dower; and the intended wife, by a memorandum subscribed to the bond, declared her free acceptance of the jointure in bar and satisfaction of dower; and the marriage took effect, and the husband died without having conveyed any such estates; it was decreed, that she should be deemed a specialty creditor, and entitled to be paid the arrears of her annuity out of his personal estate in the course of administration; and if that was not sufficient, then out of the real estates in the settlement of which he was tenant in tail, provided such deficiencies did not exceed the amount of the dower which she would have been entitled to thereout, in case she had not accepted the annuity for her life (i).

§ 1250. Another case of implied trusts, in the author's view, was an assignment of *choses in action*, not negotiable at all, or not negotiable by the local law, and trusts created for the benefit of a party, who is to be the ultimate receiver of the money, or other thing, which constitutes the subject-matter of the trust.

§ 1251. Another illustration of implied trusts may be found in the common case of a suit in equity by a creditor of an estate, to recover his debt from legatees or distributees, who have received payment of their claims from the executor (acting by mistake, but *bona fide* and without fault) before a due discharge of all the debts. In such a case the executor, who has so distributed the assets, may be sued at law by the creditor. But the legatees and distributees, although there was an original deficiency of assets, are not at law suable by the creditor. Yet he has a clear right in equity, in such a case, to follow the assets of the testator into their hands, as a trust fund for the payment of his debt. The legatee and distributee are in equity treated as trustees for this purpose; for they are not entitled to anything, except the surplus of the assets after all the debts are paid. Besides, they, in the case put, being

(g) *Lechmere v. Charlton*, 15 Ves. 197, 198.

(h) *Countess of Mornington v. Keane*, 2 De G. & J. 292.

(i) *Forster v. Forster*, 1 Bro. C. C. 489, 493. The plaintiff was the widow's son, which may explain the liability of the estates of which the covenantor was tenant in tail. It is extremely doubtful if the case would be followed at the present day.

ultimately responsible to pay the debt to the executor out of such assets, if the executor should be compelled to pay it to the creditor by a suit at law, may be made immediately liable to the creditor in equity. But the other is the more broad and general ground, as the creditor may sometimes have a remedy, when the executor, if he has paid over the assets, might not have any against the legatees or distributees (*k*).

§ 1253. A case of an analogous nature is that of partnership property, on which the joint creditors, in case of bankruptcy, are deemed in equity to have a right of priority of payment before the private creditors of any separate partner. The joint property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts against all persons not having a higher equity (*l*). A long series of authorities (as has been truly said) has established this equity of the joint creditors, to be worked out through the medium of the partners (*m*); that is to say, the partners have a right, *inter se*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right except to his own share of the residue; and the joint creditors are, in case of bankruptcy, substituted in equity to the rights of the partners, as being the ultimate *cestuis que trustent* of the fund to the extent of the joint debts. The creditors, indeed, have no lien; but they have something approaching to a lien, that is, they have a right to sue at law, and by judgment and execution, to obtain possession of the property (*n*); and in equity, they have a right to follow it, as a trust, into the possession of all persons who have not a superior title. But, in the meantime, the creditors cannot prevent the partners from transferring it by a *bona fide* alienation.

§ 1254. Having considered some of the more important classes of implied trusts, arising from the presumed intention of the parties, we may next pass to the consideration of those implied trusts (or perhaps, more properly speaking, those constructive trusts), which are independent of any such intention, and are forced upon the conscience of the party, by the mere operation of law. Some cases of this sort have been already incidentally mentioned under former heads, but a concise review of the general doctrine seems indispensable in this place to a thorough understanding of Equitable Jurisdiction (*o*).

§ 1255. One of the most common cases in which a court of equity has acted upon the ground of implied trusts *in invitum* is, where a party has received money which he cannot conscientiously withhold from another party. But in later times, a jurisdiction to enforce a bare

(*k*) *Anon.*, 1 Vern. 162; *Newman v. Barton*, 2 Vern. 205; *Noel v. Robinson*, 1 Vern. 94, and Raithby's note (1).

(*l*) *Ante*, § § 675, 1207; *post*, § 1253.

(*m*) *Campbell v. Mullett*, 2 Swanst. 574; *Ex parte Ruffin*, 6 Ves. 126 to 128; *Taylor v. Fields*, 4 Ves. 396; *Young v. Keighley*, 15 Ves. 557; *ante*, § § 675, 1207, 1243.

(*n*) See cases cited in last note; *Ex parte Williams*, 11 Ves. 3, 5, 6; *Ex parte Kendall*, 17 Ves. 521, 526.

(*o*) *Ante*, § 675.

money claim where the courts of common law gave an adequate remedy, was disclaimed, unless some special equity could be shown (*p*).

§ 1257. The author then instanced cases where a party purchases from a trustee trust property, knowing it to be such, and in violation of the objects of the trust, as an illustration of a constructive trust. A very eminent judge in more recent times based the remedy upon fraud, although he admitted that the accountability of the party was co-extensive with that of an express trustee (*q*). Most decisions treat the recipient of trust property with notice of the trust as a constructive trustee (*r*) (indorsing the author's view) who has the privilege of pleading the statute of limitations, which would be displaced by any circumstance of fraud (*s*). If a party intermeddles actively in the administration of an express trust he becomes an express trustee (*t*).

§ 1258. Accordingly, wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced (*u*), it will be held, in its new form, liable to the rights of the original owner, or *cestui que trust* (*x*). The general ground upon which it is founded finds its analogical law, that no change of state or form can justify a breach of duty in an agent in respect of an application of property (*y*).

§ 1259. Thus, for instance, if A. is trusted by B. with money to purchase a horse for him, and A. purchases a carriage with that money, in violation of the trust, B. is entitled to the carriage, and may, if he chooses so to do, sue for it at law. So, if A. entrusts money with a broker, to buy Bank of England stock for him, and he invests the money in American stocks, A. is entitled to, and may maintain an action at law for, those stocks, in whosoever hands he finds them, not being a purchaser for a valuable consideration without notice. It matters not in the slightest degree, into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the product of a substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description (*z*).

(*p*) See *Rogers v. Ingham*, 3 Ch. D. 351.

(*q*) *Rolfe v. Gregory*, 4 De G. J. & S. 576.

(*r*) *Hill v. Simpson*, 7 Ves. 152; *Sheridan v. Joyce*, 1 Jo. & Lat. 401; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *In re Champion*, *Dudley v. Champion*, [1893] 1 Ch. 101.

(*s*) *Petre v. Petre*, 1 Drew. 393.

(*t*) *Soar v. Ashwell*, [1893] 2 Q. B. 390, where the principal cases are referred to.

(*u*) *Scott v. Beecher*, 4 Price, 346.

(*x*) *In re Champion*, *Dudley v. Champion*, [1893] 1 Ch. 101.

(*y*) *Taylor v. Plumer*, 3 M. & S. 562.

(*z*) *Taylor v. Plumer*, 3 M. & S. 562; *Harris v. Trueman*, 7 Q. B. D. 340; affirmed 9 Q. B. D. 264.

§ 1260. Cases may readily be put, where this doctrine would be enforced in equity, under circumstances in which it could not be applied at law. Thus, for instance, if a trustee, in violation of his duty, should lay out the trust-money in land, and take a conveyance in his own name, the *cestui que trust* would be without any relief at law. But a court of equity would hold the *cestui que trust* to be the equitable owner of the land, and would decree it to him accordingly; not upon any notion of his having ratified the act, but upon the mere ground of a wrongful conversion, creating, *in foro conscientiarum*, a trust in his favour (a).

§ 1261. Upon similar grounds, where a trustee, or other person, standing in a fiduciary relation, makes a secret profit out of any transactions within the scope of his agency or authority, that profit will belong to his *cestui que trust*; for it is a constructive fraud upon the latter to employ that property contrary to the trust, and to retain the profit of such misapplication; and by operation of equity, the profit is immediately converted into a constructive trust in favour of the party entitled to the benefit (b). For the like reason a trustee, becoming a purchaser of the estate of his *cestui que trust*, is deemed incapable of holding it to his own use, unless he has made the fullest disclosure to the *cestui que trust* (c). Nor is the doctrine confined to trustees, strictly so called. It extends to all other persons standing in a fiduciary relation to the party, whatever that relation may be (d).

§ 1262. In cases of this sort, the *cestui que trust* (the beneficiary) is not at all bound by the act of the other party. He has therefore an option to insist upon taking the property, or he may disclaim any title thereto, and proceed upon any other remedies, to which he is entitled, either *in rem* or *in personam* (e). The substituted fund is only liable at his option (f). But he cannot insist upon opposite and repugnant rights. Thus, for example, if a trustee of land has sold the land in violation of his trust, the beneficiary cannot insist upon having the land, and also the notes given for the purchase-money; for, by taking the latter, at least so far as it respects the purchaser, he must be deemed to affirm the sale. On the other hand, by following his title in the land, he repudiates the sale (g).

§ 1263. So, where an executor or trustee, instead of executing any trust, as he ought, as by laying out the property, either in well-secured

(a) *Thornton v. Stokill*, 1 Jur. N. S. 751; *In re Salmon, Priest v. Uppley*, 42 Ch. D. 351.

(b) *Parker v. McKenna*, L. R. 10 Ch. 96; *In re Haslam v. Hier Evans*, [1902] 1 Ch. 765; *Att.-Gen. (Canada) v. Standard Trust Co. of N. Y.*, [1911] A. C. 498.

(c) *Ante*, § § 321, 322.

(d) *Brookman v. Rothschild*, 5 Bligh N. S. 165. See *ante*, § § 315 to 328.

(e) *Docker v. Somes*, 2 Myl. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen 722, 4 M. & Cr. 41, 22 Beav. 84.

(f) *Watts v. Girdlestone*, 6 Beav. 188, 190, 191.

(g) *Pocock v. Reddington*, 5 Ves. 794; *Forrest v. Elwes*, 4 Ves. 492; *Phillipson v. Gatty*, 7 Hare, 516; s.c. 2 Hall and T. 459.

real estates, or in authorized securities, takes upon himself to dispose of it in another manner; or where, being entrusted with stock, he sells it in violation of his trust; in every such case, the parties beneficially entitled have an option to make him replace the stock or other property: or if it is for their benefit, to affirm his conduct, and take what he has sold it for, with interest, or what he has invested it in; and if he has made more, they may charge him with that also. But they cannot insist upon repugnant claims; such as, for instance, in the case of a sale of stock; to have the stock replaced, and to have interest (instead of the dividends), or to take the money, and have the dividends, as if it had remained stock (*h*).

§ 1264. Wherever a trustee is guilty of a breach of trust by the sale of the trust property to a *bona fide* purchaser, for a valuable consideration without notice, the trust in the property is extinguished. But if afterwards he should re-purchase, or otherwise become entitled to the same property, the trust would revive, and re-attach to it in his hands; for it will not be tolerated in equity, that a party shall, by his own wrongful act, acquire an absolute title to that which he is in conscience bound to preserve for another. In equity, even more strongly than at law, the maxim prevails, that no man shall take advantage of his own wrong (*i*). “The only exception to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a *bona fide* purchaser without notice, and has got it back again” (*k*).

§ 1265. The truth is, that courts of equity in regard to fraud, whether it be constructive or actual, have adopted principles exceedingly broad and comprehensive, in the application of their remedial justice; and, especially, where there is any fraud touching property, they will interfere, and administer a wholesome justice, and sometimes even a stern justice, in favour of innocent persons, who are sufferers by it, without any fault on their own side. This is often done, by converting the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense, by way of equitable trust or lien. Thus a fraudulent purchaser will be held a mere trustee for the honest but deluded and cheated vendor. A person who has fraudulently procured a conveyance to be made in his favour by an idiot or lunatic, will be held a trustee for the benefit of the persons who are prejudiced by the fraud. A person who lies by, and without notice suffers his own estate to be sold and encumbered in favour of an innocent purchaser or lender, will be held a trustee of the estate for the latter.

(*h*) *Aspland v. Watt*, 20 Beav. 474.

(*i*) *Bovey v. Smith*, 2 Ch. C. 124; s.c. 1 Vern. 84; *Gordon v. Holland*, 82 L. J. P. C. 81.

(*k*) *In re Stapleford Colliery Company, Barrow's Case*, 14 Ch. D. 432, 445; per Sir George Jessel, M.R.

An heir, preventing a charge or devise of an estate to another, by a promise to perform the same, personally, will be held a trustee for the latter, to the amount of the charge, or beneficial interest intended. An agent, authorized to purchase an estate for another, who purchases the same for himself, will be held a trustee of his principal. But it is unnecessary to pursue this subject further, as many illustrations of a like nature have been already given under the heads of actual fraud, and constructive fraud.

§ 1266. Having thus gone over most of the important heads of equity jurisprudence, falling under the denomination of express or implied trusts, we shall conclude this subject by a short review of some of the doctrines, as to the nature and extent of the responsibility of trustees, and as to the remedies, which may be resorted to, to enforce a due performance of trusts.

§ 1267. It is not easy, in a great variety of cases, to say what the precise duty of a trustee is; and, therefore, it often becomes advisable for him, before he acts, to seek the aid and direction of a court of equity; and this he now may do upon a summary application under Rules of the Supreme Court, Order LV., rule 3. We have already seen that his acts done to the prejudice of the *cestui que trust* (or beneficiary) are sometimes such as are binding, and cannot be recalled; and sometimes are such as a court of equity will not punish by treating them as breaches of trust (*l*). But the cases in which such acts will be deemed violations of trust, for which a trustee will be held responsible in equity, are difficult to be defined. It has been often said, that, what he may be compelled to do by a suit he may voluntarily do without a suit. But this (as we have also seen) is a doctrine requiring many qualifications, and by no means to be generally relied on for safety (*m*).

§ 1268. In a general sense a trustee is bound by his implied obligation, to perform all those acts which are necessary and proper for the due execution of the trust which he has undertaken. But as he is supposed merely to take upon himself the trust as a matter of honour, conscience, friendship, or humanity, and as he is not entitled to any compensation for his services, at least not without some express or implied stipulation for that purpose, the learned author suggested that he should, upon the analogous principles applicable to bailments, be bound only to good faith and reasonable diligence; and, as in the case of a gratuitous bailee, be liable only for gross negligence. He was, however, constrained to admit that courts of equity do not, in fact, always limit the responsibility of trustees, or measure their acts, by such a rule.

§ 1269. In respect to the preservation and care of trust property, it has been said that a trustee is to keep it as he keeps his own,

(*l*) *Ante*, § § 977 to 979, 995.

(*m*) *Ante*, § 979.

And, therefore, if he is robbed of money, belonging to his *cestui que trust*, without his own default or negligence (or perhaps, strictly speaking, without his own gross default or negligence), he will not be chargeable. He is even allowed in equity to establish, by his own oath, the amount so lost; for he cannot possibly, in ordinary cases, have any other proof (*n*). So, if he should deposit the money with a banker in good credit, or remit it to the proper place by a bill drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible (*o*). The rule, in all cases of this sort, is, that, where a trustee acts by other hands, either from necessity, or conformably to the common usage of mankind, he is not to be made answerable for losses. This subject was considered by the House of Lords, and it was there laid down, affirming the doctrine here previously advanced, that a trustee is bound to conduct the business of the trust in the same way in which an ordinarily prudent man of business conducts his own, and has no further obligation. He may employ brokers and agents in cases in which they are employed in the ordinary course of business; and if any loss happen to the trust fund, through the defalcation of the agent so justifiably employed by him, he will not be liable. So a trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or honesty. He does not in any sense guarantee the performance of their duties (*p*). But in employing professional agents the trustees are not entitled to delegate to them matters of management and discretion, nor to commit to them matters outside their professional calling (*q*). By section 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), a trustee—the power is not applicable to the agent of the trustee (*r*)—may authorize a solicitor to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the trustee to have the custody of and to produce a deed with a receipt for the consideration money, and is not to be deemed guilty of a breach of trust by reason of his so doing; and he may appoint a banker or solicitor to be his agent to receive the moneys due under a policy of assurance, by permitting the banker or solicitor to have the custody of the policy of assurance with a receipt signed by the trustee. The section, however, requires the trustee to get the money into his hands or under his control within a reasonable time, which is decided

(*n*) *Morley v. Morley*, 2 Ch. Cas. 2; *Jobson v. Palmer*, [1895] 1 Ch. 71.

(*o*) *Knight v. Lord Plymouth*, 3 Atk. 480; *France v. Wood*, Tambl. 172; *Bacon v. Clark*, 3 M. & Cr. 294; *Wilkes v. Groom*, 3 Drew. 584.

(*p*) *Speight v. Gaunt*, 9 App. Cas. 1.

(*q*) *Fry v. Tapson*, 28 Ch. D. 568; *In re Weall*, *Andrews v. Weall*, 42 Ch. D. 674.

(*r*) *In re Hetley & Morton's Contract*, [1893] 3 Ch. 280.

upon the fact when the trustee knew or ought to have known that the banker or solicitor has received the money or property (s).

§ 1270. In all cases, however, in which a trustee places money in the hands of a banker, he should take care to keep it separate and not mix it with his own in a common account; for, if he should so mix it, he would be deemed to have treated the whole as his own; and he would be held liable to the *cestui que trust* for any loss sustained by the banker's bankruptcy (t).

§ 1271. In respect to the manner of managing funds and laying out money on securities, and even in respect to allowing trust-money to remain in the hand of debtors, considerable strictness is required by the rules of courts of equity. It has been remarked by Lord Hardwicke on one occasion, that these rules should not be laid down with a strictness to strike terror into mankind, acting for the benefit of others, and not for their own (u). And upon another occasion, as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to loss, which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office (x).

§ 1272. There is manifest good sense in these remarks. But they came to be systematically disregarded in courts of equity. The unnecessary rigour of the court in its later history in dealing with honest trustees at last became a crying evil calling for the intervention of the legislature. Summarized, the provisions of the statutes may be said to have created four classes of trustees—(a) the trustee with trust property still in his hands or under his control; (b) the fraudulent trustee; (c) the rash and improvident trustee and (d) the honest trustee. The trustee who retains or who can still dispose of the trust property of course requires no protection, and the fraudulent trustee deserves none. But the two remaining classes may now plead the Statute of Limitations as against beneficiaries or creditors, with this qualification, that the statute does not run against a beneficiary unless and until his interest shall be an interest in possession: Trustee Act, 1888, sec. 8 (y). But the court has an extended power to grant relief to a trustee who has acted honestly and reasonably, and who ought fairly to be excused for the breach of trust, by section 3 of the

(s) *In re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50.

(t) *Macdonnell v. Harding*, 7 Sim. 178; *Rehden v. Wesley*, 29 Beav. 213

(u) *Ex parte Belchier, Ex parte Parsons*, Ambler 219.

(x) *Knight v. Earl of Plymouth*, 1 Dick. 126, 127; s.c. 3 Atk. 480.

(y) *Thorne v. Heard*, [1895] A. C. 495; *How v. Earl Winterton*, [1896] 2 Ch. 626; *Reid—Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A.C. 555; *In re Blow, St. Bartholomew's Hospital v. Campden*, [1914] 1 Ch. 233; *In re Allsop, Whitaker v. Bamford*, [1914] 1 Ch. 1.

Judicial Trustees Act, 1896 (z). A remunerated trustee is not entitled to the same favourable consideration as a trustee who acts gratuitously (a). This section does not entitle a trustee to deal in an improvident manner with the property committed to his control, he may be honest but he must also act reasonably (b). Among the acts which have been judicially excused under the section are trusting to the honesty of an agent (c), misguided confidence in the skill of an agent (d), refusal to embark on litigation where the result was uncertain (e), or the sum at stake small (f). But a trustee on appropriating securities to some of the shares, should take reasonable precautions to satisfy himself that securities retained to be appropriated to other shares are sufficient (g). With these exceptions, a trustee must observe certain rules laid down by courts of equity for the exercise of the discretion of trustees, which import (to say the least) extraordinary diligence and vigilance in the management of the trust property (h).

§ 1273. Thus, if a trustee should lay out trust funds in any stock not authorized by Act of Parliament or by the instrument creating the trust, although there should be no *mala fides*; yet, if the stock should fall in value, he would be held responsible for the loss (i). In other words, a court of equity will, in such cases, require that a trustee should act with all the scrupulous circumspection, caution, and wisdom, with which the court itself, from its long experience and superior means of information, is accustomed to act: a doctrine, certainly, somewhat perilous to trustees, and startling to uninstructed minds. It is, to adopt the language of Lord Bacon, substituting for the private conscience of the trustee, "the general conscience of the realm, which is chancery" (k).

§ 1274. So, if a trustee should invest trust-money in mere personal securities, however unexceptionable they might seem to be, in case of any loss by the bankruptcy of the borrower, he would be held responsible (l). Nay, it will be at the peril of the trustee to suffer

(z) *Perrins v. Bellamy*, [1899] 1 Ch. 797; *In re Alsop, Whitaker v. Bamford*, [1914] 1 Ch. 1.

(a) *National Trustee Co. of Australasia v. General Finance Co.*, [1905] A. C. 373.

(b) *In re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583; *In re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328.

(c) *In re Lord De Clifford, Lord De Clifford v. Quilter*, [1900] 2 Ch. 707; *In re Mackay, Griessermann v. Carr*, [1911] 1 Ch. 300.

(d) *Perrins v. Bellamy*, [1899] 1 Ch. 797; *In re Allsop, Whitaker v. Bamford*, [1914] 1 Ch. 1.

(e) *In re Roberts, Knight v. Roberts*, 76 L. T. 479.

(f) *In re Grindey, Clews v. Grindey*, [1898] 2 Ch. 593.

(g) *In re Brookes, Brookes v. Taylor*, [1914] 1 Ch. 558.

(h) See *Learoyd v. Whiteley*, 12 App. Cas. 727.

(i) *Hancom v. Allen*, 2 Dick. 498; *Trafford v. Boehm*, 3 Atk. 444. See *Fyler v. Fyler*, 3 Beav. 550.

(k) Bacon on Uses, by Rowe, p. 10.

(l) *Adye v. Feuillateau*, 1 Cox, 24; *Wilkes v. Steward*, G. Coop. 6.

a debt to remain upon the mere personal credit of the debtor, although the testator, who created the trust, had left it in that very state (*m*). The principle is even carried further; and in cases of personal security taken by a trustee, he is made responsible for all deficiencies, and is also chargeable for all profits, if any are made. So that he acquires a double responsibility, although, in such cases, he may have acted with entire good faith, in the exercise of what he supposed to be a sound discretion (*n*).

§ 1275. In relation to trust property, it is the duty of the trustee, whether it be real estate or be personal estate, to defend the title at law, in case of any action being brought respecting it; to give notice, if it may be useful and practicable, of such suit to his *cestui que trust*; to prevent any waste, or delay, or injury to the trust property; to keep regular accounts (*o*); to afford accurate information to the *cestui que trust* of the disposition of the trust property; and if he has not all the proper information to put his beneficiaries in the way to obtain it (*p*). Finally; he is to act in relation to the trust property with reasonable diligence; and in cases of a joint trust, he must exercise due caution and vigilance in respect to the approval of, and acquiescence in, the acts of his co-trustees; for, if he should deliver over the whole management to the others, and betray supine indifference, or gross negligence, in regard to the interests of the *cestui que trust*, he will be held responsible (*q*).

§ 1276. These remarks apply to the ordinary case of a trustee, having a general discretion and exercising his powers without any special directions. But where special directions are given by the instrument creating the trust, or special duties are imposed upon the trustee, he must follow out the objects and intentions of the parties faithfully, and be vigilant in the discharge of his duties. There are, necessarily, many incidental duties and authorities, belonging to almost every trust, which are not expressed. But these are to be as steadily acted upon and executed, as if they were expressed. It would be impossible, in a work like the present, to make even a general enumeration of these incidental duties and authorities of a trustee; as they must always depend upon the peculiar objects and structure of the trust.

§ 1277. In regard to interest upon trust funds, the general rule is, that, if a trustee has made interest upon those funds, or ought

(*m*) *Lowson v. Copeland*, 2 Bro. Ch. C. 156, and Mr. Belt's note; *Walker v. Symonds*, 3 Swanst. 1; *Styles v. Gury*, 1 Mac. & G. 422; *In re Brogden, Billing v Brogden*, 38 Ch. D. 546.

(*n*) *Adye v. Feuilliteau*, 3 Swanst. 84, note; s.c. 1 Cox 24.

(*o*) *Freeman v. Fairlie*, 3 Meriv. 29, 41; *Pearse v. Green*, 1 Jac. & Walk. 135, 140; *Adams v. Clifton*, 1 Russ. 297.

(*p*) *Walker v. Symonds*, 3 Swanst. 58, 73; *In re Tillott, Lee v. Wilson*, [1892] 1 Ch. 86; *In re Dartnall, Sawyer v. Goddard*, [1895] 1 Ch. 474.

(*q*) *Bone v. Cook*, McCl. 168; *Burrowes v. Wales*, 5 De G. M. & G. 233.

to have invested them so as to yield interest, he shall, in each case, be chargeable with the payment of interest (*r*). In some cases, courts of equity will even direct annual or other rests to be made; the effect of which will be, to give to the *cestui que trust* the benefit of compound interest. But such an interposition requires extraordinary circumstances to justify it (*s*). Thus, for example, if a trustee, in manifest violation of his trust, has applied the trust funds to his own benefit and profit in trade; or has sold out the trust stock, and applied the proceeds to his own use; or has conducted himself fraudulently in the management of the trust funds; or has wilfully refused to follow the positive directions of the instrument creating the trust, as to investments; in these, and the like cases, courts of equity will fix the defaulter with a penal rate of interest (*t*). The true rule in equity in such cases is, to take care that all the gain shall go to the *cestui que trust*.

§ 1278. The object of this whole doctrine is, to compensate the *cestui que trust*, and to place him in the same situation as if the trustee had faithfully performed his own proper duty. It has even a larger and more comprehensive aim, founded in public policy, which is to secure fidelity by removing temptation, and by keeping alive a sense of personal interest and personal responsibility. It seems, however, to have been of a comparatively late introduction into equity jurisprudence; and probably was little known in England at an earlier period than the reign of Charles the Second.

§ 1279. The Roman law acted with the same protective wisdom and foresight. In that law, if a guardian, or other trustee, was guilty of negligence in suffering the money of his ward to remain idle, he was chargeable, at least, with the ordinary interest. “*Quod si pecunia mansisset in rationibus pupilli, præstandum quod bonâ fide percepisset, aut percipere potuisset, sed fœnori dare, cum potuisset, neglexisset; cum id, quod ab alio debitore nomine usurarum cum sorte datur, ei, qui accipit, totum sortis vice fungitur, vel fungi debet*” (*u*). But where the guardian, or other trustee, went beyond the point of mere negligence, and was guilty of a gross abuse of his trust, the Roman law sometimes inflicted upon him a grievous interest, in the nature of a compound interest, but often greatly exceeding it (*x*). “*Quoniam, ubi quis ejus pecuniam, cujus tutelam negotiave administrat, aut Magistratus municipii publicam in usus suos convertit,*

(*r*) *Byrchall v. Bradford*, 6 Mad. 235; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Aspland v. Watt*, 20 Beav. 474.

(*s*) *Raphael v. Boehm*, 11 Ves. 91; 13 Ves. 407, 591; *In re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

(*t*) *Hall v. Hallet*, 1 Cox, 134; *Walmesley v. Walmesley*, 3 Jo. & Lat. 556; *Gray v. Haig*, 20 Beav. 219; *In re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162; *In re Davis, Davis v. Davis*, [1902] 2 Ch. 314.

(*u*) Dig Lib. 26, tit. 7, f. 58, § 1; *ibid.* f. 7, § 3, 4.

(*x*) See Pothier, Pand. Lib. 27, tit. 3, n. 47; 1 Domat, B. 5, tit. 5, § 1, art. 14.

maximas usuras præstat. Sed istius diversa causa est, qui non sibi sumsit ex administratione nummos, sed ab amico accepit, et ante negotiorum administrationem. Nam illi, de quibus constitutum est (cum gratuitam certe integram et abstinentem omni lucro præstare fidem deberent) licentia, quâ videntur abuti, maximis usuris, vice cujusdam pœnæ, subjiuntur" (y).

§ 1280. In cases where there are several trustees, the point has often arisen, how far they are to be deemed responsible for the acts of each other. The general rule is, that they are responsible only for their own acts, and not for the acts of each other, unless they have made some agreement, by which they have expressly agreed to be bound for each other; or they have, by their own voluntary co-operation or connivance, enabled one or more to accomplish some known object in violation of the trust (z). And the mere fact that trustees, who are authorized to sell lands for money, or to receive money, jointly execute a receipt for the money to the party who is debtor or purchaser, will not ordinarily make either liable, except for so much of the money as has been received by him; although in the case of executors, it would be different. The reasons assigned for the doctrine and the difference are as follows. Trustees have all equal power, interest, and authority, and cannot act separately, as executors may; but must join, both in conveyances and receipts. For one trustee cannot sell without the other; or make a claim to receive more of the consideration-money, or to be more a trustee than the other. It would, therefore, be against natural justice to charge them (seeing they are thus compellable, either not to act at all or to act together) with each other's receipts, unless there be some default or negligence on their own part, independent of joining in such receipt (a).

§ 1281. The propriety of the doctrine, which, in favour of trustees, makes them liable only for their own acts and receipts, has never been questioned; and, indeed, stands upon principles of general justice. It has been well said, that it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time, that the charge upon him, by his joining in the receipt, is but notional (b). There is a good deal more question as to the distinction, which is made unfavourably in regard to executors, who have a several authority by law, and whose signature as an admission of liability, is now finally established in the equity jurisprudence of England (c).

(y) Dig. Lib. 3, tit. 5, f. 38. See also Dig. Lib. 26, tit. 7, f. 7, § 4 to 10; *ibid.* Lib. 5, tit. 56.

(z) *Ante*, § 1275.

(a) *Townley v. Sherburne*, J. Bridgm. 35; *Brice v. Stokes*, 11 Ves. 319.

(b) Lord Cowper, in *Fellows v. Mitchell*, 1 P. Will. 83.

(c) *Brice v. Stokes*, 11 Ves. 319; *Moses v. Levi*, 3 Y. & C. Ex. 359.

§ 1282. But, although the general rule, in regard to trustees, is that they shall be liable only for their own acts and receipts, yet some nice distinctions have been indulged by courts of equity, which require notice in this place. Thus, for example, it has been said, that, where they join in a receipt for money, and it is not distinguishable on the face of the receipt, or by other proper proofs, how much has been received by one and how much by the other trustee, it is reasonable to charge each with the whole (*d*). The case has been likened to that of a man throwing his own corn or money into another man's heap, where there is no reason that he who made this difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part, where he who has made the difficulty shall not be permitted to avail himself of it; but, if there is any loss, he shall bear it himself (*e*).

§ 1283. Perhaps the following may be found to be the truest exposition of the principle, which ought, in justice, to regulate every case of this sort, whether it be the case of executors, or of guardians, or of trustees. It is, that if two executors, guardians, or trustees, join in a receipt for trust money, it is *primâ facie*, although not absolutely, conclusive evidence that the money came to the hands of both. And either of them may show, by satisfactory proof, that his joining in the receipt was necessary, or merely formal, and that the money was, in fact, all received by his companion. But without such satisfactory proof, he ought to be held jointly liable to account to the *cestui que trust* for the money, upon the fair implication, resulting from his acts, that he did not intend to exclude a joint responsibility (*f*). But, wherever either a trustee, or an executor, by his own negligence or laches, suffers his co-trustee or co-executor to receive or waste the trust fund or assets of the testator, when he has the means of preventing such receipt and waste, by the exercise of reasonable care and diligence, then, and in such a case, such trustee or executor should be held personally responsible for the loss occasioned by such receipt and waste of his co-trustee or co-executor (*g*).

§ 1283a. The mere appointment by the trustees of one of them to be the factor of the others for the property, is not of itself such a breach of trust as subjects the other trustees to all the consequences of it, nor does it make them liable as such for permitting the factor trustee to retain balances in his hands, unless they are thereby guilty of gross negligence. Still, however, by the appointment of such trustee as factor, they become liable for his default as agent, although not as

(*d*) *Fellows v. Mitchell*, 1 P. Will. 83.

(*e*) *Fellows v. Mitchell*, 1 P. Will. 83. Per Lord Cowper.

(*f*) *Scurfield v. Howes*, 3 Bro. C. C. 90, and Mr. Belt's notes; *Joy v. Campbell*, 1 Sch. & Lefr. 341; *Williams v. Nixon*, 2 Beav. 472.

(*g*) *Walker v. Symonds*, 3 Swanst. 1; *Williams v. Nixon*, 2 Beav. 472; *Darbishire v. Horne*, 3 De G. M. & G. 80.

trustee, in the same way that they would be liable for the default of any other person whom they might appoint to the office (*h*). And a trustee, by becoming the factor or cashier of the trust property, does not thereby incur any additional liability in respect to its management beyond what he was subject to as trustee (*i*).

§ 1284. Again; if, by any positive act, direction, or agreement of one joint executor, guardian, or trustee, the trust money is paid over, and comes into the hands of the other, when it might and should have been otherwise controlled or secured by both, there each of them will be held chargeable for the whole, or so much thereof as has been misapplied (*k*). So, if one trustee should wrongfully suffer the other to detain the trust money a long time in his own hands, without security; or should lend it to the other on his simple note; or should join with the other in lending it to a tradesman upon insufficient security; in all such cases he will be deemed liable for any loss (*l*). *A fortiori*, one trustee will be liable, who has connived at, or been privy to, an embezzlement of the trust money by another; or if it is mutually agreed between them that one shall have the exclusive management of one part of the trust property, and the other of the other part (*m*).

§ 1284a. But here it may be important to take notice of another illustration of the doctrine, that courts of equity administer their aid only in favour of persons who exercise due diligence to enforce their rights, and are guilty of no improper acquiescence or delay; upon the maxim so often referred to, “*Vigilantibus, non dormientibus, æquitas subvenit.*” Hence, if there be a clear breach of trust by a trustee; yet, if the *cestui que trust*, or beneficiary, has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him; but leave him to bear the fruits of his own negligence or infirmity of purpose (*n*).

§ 1284b. The course of inquiry in the courts of equity in regard to the default of trustees, is as follows:—A trustee cannot be put on trial there, for an account on the footing wilful default or neglect, unless the plaintiff prove, and in former times also had alleged in his pleadings, at least one act of wilful neglect, or default before the master (*o*).

§ 1284c. And where there are numerous trustees, the personal responsibility of each, for the acts of the others, must depend much

(*h*) *Horne v. Pringle*, 8 Cl. & F. 264; *Toplis v. Hurrell*, 19 Beav. 198; *Shepherd v. Harris*, [1905] 2 Ch. 310.

(*i*) *Horne v. Pringle*, 8 Cl. & F. 264. See *Davis v. Spurling*, 1 Russ. & M. 64.

(*k*) *Broadhurst v. Balguy*, 1 Y. & C. Ch. 17; *Hewitt v. Foster*, 6 Beav. 259; *Frutch v. Lamprell*, 20 Beav. 116.

(*l*) *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Keble v. Thompson*, 3 Bro. C. C. 112; *Langston v. Ollivant*, G. Coop. 33; *Burrows v. Walls*, 5 De G. M. & G. 233.

(*m*) *Boardman v. Mosman*, 1 Bro. C. C. 68.

(*n*) *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. 16; *Paddon v. Richardson*, 7 De G. M. & G. 563.

(*o*) *Sleight v. Lawson*, 3 K. & J. 292; *In re Youngs*, *Doggett v. Revett*, 30 Ch. D. 421.

upon his ability to interpose and hinder the others from pursuing the course which resulted in the loss. This will depend upon the nature of the trust, and how far the duty and right to act is joint, and incapable of execution, except by the concurrence of all the trustees. In general, this concurrence is required in regard to trusts which are of a private and personal nature (*p*). But in regard to such trusts as are of a public nature, the trustees may act by the majority (*q*). But executors in the settlement of estates, may act severally, as in the collection of debts (*r*).

§ 1285. In cases of a breach of trust, the question has arisen, in what light the debt, created by such breach of trust, is to be viewed; whether it is to be deemed a debt by simple contract, and so binding upon the personal assets, only, of the trustee, or a debt by specialty. At law, so far as any remedy exists there, the debt is treated as a simple contract debt, even though the trust arises under a deed executed by the trustees, and contains a clause, that no trustee shall be chargeable or accountable for any money arising in execution of the trust, except what he shall actually receive, unless there be some corresponding covenant also on the part of the trustees. For this is a common clause of indemnity in trust deeds; and the true sense of it is, that the trustees shall not be accountable for more than they receive. They are, in fact, accountable for what they actually receive, but not accountable as under a covenant (*s*).

§ 1286. The rule in courts of equity is the same. The debt created by a breach of trust is there considered but as a simple contract debt, even although circumstances of fraud appear; unless, indeed, the trustee in the trust deed use any words which can be construed as a covenant by himself (*t*). But, cases of this sort have long since ceased to be of practical importance in England.

§ 1287. Courts of equity will not only hold trustees responsible for any misapplication of trust property, and any gross negligence or wilful departure from their duty in the management of it; but they will go farther, and in cases requiring such a remedy, they will remove the old trustees and substitute new ones. Indeed, the appointment of new trustees is an ordinary remedy, enforced by courts of equity under their inherent jurisdiction not only where there is a failure of suitable trustees to perform the trust, either from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, but in all cases where that course is deemed advisable (*u*). Where the scheme of a charity provided, that if "any or either of the trustees

(*p*) *Ante*, § 1062.

(*q*) *Perry v. Shipway*, 2 De G. & J. 353.

(*r*) *Hudson v. Hudson*, 1 Atk. 460; *Smith v. Everett*, 27 Beav. 446.

(*s*) *Bartlett v. Hodgson*, 1 T. R. 42, 44.

(*t*) *Vernon v. Vawdry*, 2 Atk. 119; *Isaacson v. Harwood*, L. R. 3 Ch. 225; *Holland v. Holland*, L. R. 4 Ch. 449.

(*u*) *Lettershelt v. Broers*, 9 App. Cas. 371.

should depart from the United Kingdom, from whatever cause or motive, or under whatsoever circumstances, he should be considered as discharged, and disqualified," it was held that a temporary absence abroad was not within the provision (x). The High Court is now empowered by section 25 of the Trustee Act, 1893 (56 & 57 Vict. c. 24), to appoint a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee, whenever it is expedient to do so, and it is found inexpedient, difficult, or impracticable to do so without the assistance of the court. And without prejudice to the generality of this power, a conviction for felony, or bankruptcy (y), are particularized as grounds for removal.

§ 1288. The doctrine seems to have been carried so far by the courts, as to remove a joint trustee from a trust, who wished to continue in it without any direct or positive proof of his personal default, upon the mere ground that the other co-trustees would not act with him; for, in a case where a trust is to be executed, if the parties have become so hostile to each other that they will not act together, the very danger to the due execution of the trust, and the due disposition of the trust fund, requires such an interposition to prevent irreparable mischief (z).

§ 1289. But, in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust (a). It is not, indeed, every mistake, or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course (b). But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of a proper capacity to execute the duties, or a want of reasonable fidelity.

§ 1290. Before concluding the subject of trusts, it may be proper to say a few words in regard to such trusts as either attach to trust property situate in a foreign country, or are properly to be executed in a foreign country. The considerations belonging to this branch of equity jurisprudence are not, indeed, limited to cases of trust; and, therefore, we shall here bring them together in one view, as, for the most part, they are equally applicable to every subject within the reach of equitable relief.

§ 1291. The jurisdiction of courts of equity, in regard to trusts, as well as to other things, is not confined to cases where the subject-matter is within the absolute reach of the process of the court, called upon to act upon it; so that it can be directly and finally disposed of, or affected by the decree. If the proper parties are within the reach of the process

(x) *In re The Moravian Society*, 26 Beav. 101.

(y) *In re Bridgman's Trust*, 1 Dr. & Sm. 164; *In re Adam's Trust*, 12 Ch. D. 634.

(z) *Uvedale v. Ettrick*, 2 Ch. Cas. 130; decided by Lord Nottingham, Com. Dig. Chancery, 4 W. 7.

(a) *Earl of Portsmouth v. Fellows*, 5 Mad. 450; *Mayor of Coventry v. Att.-Gen.*, 7 Bro. P. C. by Tomlins, 235.

(b) *Att.-Gen. v. Caius College*, 2 Keen 150.

of the court, it will be sufficient to justify the assertion of full jurisdiction over the subject-matter in controversy (c). The decrees of courts of equity do, primarily and properly, act *in personam*, and, at most, collaterally only *in rem*. Hence, the specific performance of a contract for the sale of lands, lying in a foreign country, will be decreed in equity, whenever the party is resident within the jurisdiction of the court (d). So, an injunction will, under the like circumstances, be granted to stay proceedings in a suit in a foreign country (e).

§ 1292. These are not, however, peculiar or privileged cases for the exercise of jurisdiction; for courts of equity will, in all other cases, where the proper parties are within the territorial sovereignty, or within the reach of the territorial process, administer full relief, although the property in controversy is actually situate in a foreign country, unless, indeed, the relief which is asked is of a nature which the court is incapable of administering. Many instances of this sort may readily be adduced, to illustrate this general doctrine and its exceptions. Thus, a party resident in England, who was a joint-tenant of land, situate in Ireland, was decreed to account for waste of such land in a Court of Chancery in England, but the bill so far as it sought a partition of the same land was dismissed; because (as has been said) it is in the realty, and the court cannot award a commission into Ireland; and a bill for a partition is in the nature of a writ of partition at the common law, which lieth not in England for lands in Ireland (f).

§ 1293. The same doctrine is applied to cases of trusts attached to land in a foreign country. They may be enforced by a court of equity in the country where the trustee is a resident, and to whose process he may rightfully be subjected (g). It is also applied to cases of mortgages of lands in foreign countries. And a bill to foreclose or redeem such a mortgage may be brought in any court of equity, in any other country, where the proper parties are resident. It was aptly said, by Sir Richard Pepper Arden, Master of the Rolls, in a case then before him: "It was not much litigated that the courts of equity here have an equal right to interfere with regard to judgments and mortgages upon the lands in a foreign country, as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this court cannot act upon the land directly, but acts upon the conscience of the person here." And after citing some cases to this effect, he added: "These cases clearly show, that, with regard to any contract made in equity between persons in this country respecting lands in a

(c) *Penn v. Lord Baltimore*, 1 Ves. 444.

(d) *Penn v. Lord Baltimore*, 1 Ves. 444; *ante*, § 743.

(e) *Ante*, § 899.

(f) *Carteret v. Petty*, 2 Swanst. 323.

(g) *Harrison v. Gurney*, 2 Jac. & W. 563; *Hope v. Carnegie*, L. R. 1 Ch. 320; *Ewing v. Orr Ewing*, 9 App. Cas. 34; 10 App. Cas. 453.

foreign country, particularly British dominions, this court will hold the same jurisdiction as if they were situate in England" (h).

§ 1294. The same doctrine is applied to cases of frauds, touching contracts or conveyances of real property situate in a foreign country. Thus, if a rent-charge is fraudulently obtained on lands lying in Ireland, a bill to set it aside will be sustained in the Court of Chancery in England, if the defendant is a resident there (i). Courts of equity have gone even further, and have, in effect, as between the parties, overhauled the judgments of foreign courts, and even the sales made under those judgments, where fraud has intervened in those judgments, or a grossly inequitable advantage has been taken (k). In such cases they do not, indeed, disregard such judgments, or directly annul or control them. But they arrive at the equities between the parties in the same manner as they would if the proceedings had been mere matters *in pais*, subject to their general jurisdiction (l).

§ 1295. In some instances, language has been used which may be supposed to limit the jurisdiction to cases where the lands, though situate abroad, are yet within the general sovereignty of the nation exerting the equitable jurisdiction; as, for instance, suits in the Chancery of England, in regard to contracts, trusts, frauds, and other matters, touching lands in Ireland, or in the colonies of Great Britain. Lord Hardwicke, on one occasion, said, on this subject: "The different courts of equity are held under the same Crown, though in different dominions; and, therefore, considering this as a court abroad, the point of jurisdiction is the same as if in Ireland. And it is certain, where the provision is in England, let the cause of suit arise in Ireland, or the plantations, if the bill be brought in England, as the defendant is here, the courts do *agere in personam*, and may, by compulsion of the person and process of the court, compel him to do justice" (m). As was pointed out by the author, the Court of Chancery in England exercised a wider jurisdiction, but whether that extended jurisdiction does or does not exist, the court will not entertain proceedings relating to trusts of land in a foreign country, except so far as relates to administration (n).

(h) *Lord Cranstown v. Johnston*, 3 Ves. Jun. 182.

(i) *Earl of Arglasse v. Muschamp*, 1 Vern. 75.

(k) See *Smith v. Moffatt*, L. R. 1 Eq. 397.

(l) *Lord Cranstown v. Johnston*, 3 Ves. Jun. 170; *Jackson v. Petrie*, 10 Ves. 165; *White v. Hall*, 12 Ves. 321; Story on Conflict of Laws, § 544, 545; Com. Dig. Chancery, 3 X. 4 W. 27.

(m) *Foster v. Vassall*, 3 Atk. 589.

(n) *In re Hawthorne*, *Graham v. Massey*, 23 Ch. D. 743; *Deschamps v. Miller*, [1908] 1 Ch. 856.

CHAPTER XXXIII.

PENALTIES AND FORFEITURES.

§ 1301. HAVING thus gone over some of the principal heads of trusts, which are cognizable in equity, we shall now proceed to another important branch of equity jurisprudence, to wit, that which is exercised in cases of PENALTIES and FORFEITURES, for breaches of conditions and covenants. Originally, in all cases of this sort, there was no remedy at law; but the only relief which could be obtained was exclusively sought in courts of equity. Courts of common law were empowered by statute to grant relief in certain cases, but it was held that the original jurisdiction, however, in equity, still remained, notwithstanding the concurrent remedy at law (*a*); and, *a fortiori*, cases not within the purview of the statutes remained in the exclusive jurisdiction of the Court of Chancery.

§ 1302. Before entering upon the examination of this subject, it may be well to say a few words in regard to the nature and effect of conditions at the common law, as it may help us more distinctly to understand the nature and extent of equity jurisdiction in regard to conditions. At law (and in general the same is equally true in equity), if a man undertake to do a thing, either by way of contract or by way of condition, and it is practicable to do the thing, he is bound to perform it, or he must suffer the ordinary consequences: that is to say, if it be a matter of contract he will be liable at law for damages for the non-performance; if it be a condition, then his rights, dependent upon the performance of the condition, will be gone by the non-performance. The difficulty which arises is, to ascertain what shall be the effect in cases where the contract or condition is impossible to be performed, or where it is against law, or where it is repugnant in itself or to the policy of the law (*b*).

§ 1303. In regard to contracts, if they stipulate to do anything against law, or against the policy of the law, or if they contain repugnant and incompatible provisions, they are treated at the common law as void; for, in the first case, the law will not tolerate any contracts which defeat its own purposes; and, in the last case, the repugnancy renders it impossible to ascertain the intention of the parties; and, until ascer-

(a) See *ante*, § 89; *Seton v. Slade*, 7 Ves. 274.

(b) See Butler's note (1) to Co. Litt. 206.

tained, it would be absurd to undertake to enforce it. On the other hand, if the parties stipulate for a thing impossible to be done, and known on both sides to be so, it is treated as a void act, and as not intended by the parties to be of any validity. But if only one party knows it to be impossible, and the other does not, and is imposed upon, the latter may compel the former to pay him damages for the imposition (c). So, if the thing is physically possible, but not physically possible for the party, still it will be binding upon him, if fairly made; for he should have weighed his own ability and strength to do it (d).

§ 1304. In regard to conditions, they may be divided into four classes: (1) Those which are possible at the time of their creation, but afterwards become impossible either by the act of God, or by the act of the party; (2) Those which are impossible at the time of their creation; (3) Those which are against law, or public policy, or are *mala in se* or *mala prohibita*; (4) Those which are repugnant to the grant or gift, by which they are created, or to which they are annexed (e). The general rule of the common law in regard to conditions is, that, if they are impossible at the time of their creation, or afterwards become impossible by the act of God, or of the law, or of the party who is entitled to the benefit of them (as, for example, the feoffor of an estate, or the obligee of a bond), or if they are contrary to law, or if they are repugnant to the nature of the estate or grant, they are void. But, if they are possible at the time, and become subsequently impossible by the act of the party who is to perform them, then he is treated as *in delicto*, and the condition is valid and obligatory upon him. But the operation of this rule will, or may, as we shall presently see, under different circumstances of its application, produce directly opposite results (f).

§ 1305. In the view of the common law, a condition is considered as impossible, only when it cannot, by any human means, take effect; as, for example, that the obligee shall go from the church of St. Peter, at Westminster, to the church of St. Peter, at Rome, within three hours. But if it be only in a high degree improbable, and such as it is beyond the power of the obligee to effect, it is then not deemed impossible (g).

§ 1306. Conditions of all these various kinds will have a very different operation, where they are conditions precedent, from what they will have where they are conditions subsequent. Thus, for

(c) *Pullerton v. Agnew*, 1 Salk. 172; *Hall v. Cazenove*, 4 East, 477; Com. Dig. *Condition*, D. 1.

(d) *Thornborrow v. Whiteacre*, 2 Ld. Raym. 1164. A court of equity would relieve against a contract, like that in 2 Ld. Raym. 1164; and *James v. Morgan*, 1 Lev. 111, upon the ground of fraud or imposition, or unconscionable advantage taken of the party. *Ante*, § 188, 331.

(e) This is the classification by Mr. Butler, in his learned note (1) to Co. Litt. 206 a. See also Com. Dig. *Condition*, D. 1 to 8.

(f) Co. Litt. 206 a, and Butler's note; and *post*, § 1307; *In re Greenwood*, *Goodhart v. Woodhead*, [1903] 1 Ch. 749.

(g) Co. Litt. 206 a, and Mr. Butler's note (1); Com. Dig. *Condition*, D. 2.

example, if an estate is granted upon a condition subsequent, that is to say, to be performed after the estate is vested, and the condition is void for any of the causes above stated, there, the estate becomes absolute (*h*). But if the condition is precedent, or to be performed before the estate vests, there, the condition being void, the estate, which depends thereon, is void also, and the grantee shall take nothing by the grant; for he hath no estate, until the condition is performed (*i*). Thus, if a feoffment is made to a man in fee-simple, on condition, that, unless he goes from England to Rome in twenty-four hours, or unless he marries A. before such a day, and she dies before that day, or marries the feoffor, or unless he kills another, or in case he aliens in fee, then, and in every such case, the estate shall be void, and determine; in all these cases, the condition is void, or impossible, and being a condition subsequent, the estate is absolute in the feoffee. But if, on the other hand, a grant be made to a man, that, if he kills another, or if he goes from England to Rome within twenty-four hours, or if he marries A. before such a day, and before that day she dies, or if he does not aliene an estate before such a day, and he has already aliened it, then, and in that event, he shall have an estate in fee; in all these cases, the condition being void, or impossible, and being a condition precedent, no estate ever vests in the grantee (*k*).

§ 1307. On the other hand, if a bond or other obligation be upon a condition, which is impossible, illegal, or repugnant at the time when it is made, the bond is single, and the obligor is bound to pay it. But, if the condition be possible at the time when it is made, and afterwards becomes impossible by the act of God, or of the law, or of the obligee, there, the bond is avoided, and the obligor is not bound to pay it (*l*). But, if the condition is in the disjunctive and gives liberty to do one thing or another, at the election of the obligor; and both are possible at the time, but one part is or afterwards becomes impossible by the act of God, or of the obligee, that which is possible, ought to be performed (*m*).

§ 1307a. And where a devise was made to the vicar of a certain parish upon condition to read prayers, in the church, at the hour of eleven in the forenoon, upon every Wednesday, for ever; and that every vicar who did not observe the condition should take no advantage from the will; it was held that the neglect upon which the devise would

(*h*) *Ridgway v. Woodhouse*, 7 Beav. 437; *Corbett v. Corbett*, 14 P. D. 7; *Partridge v. Partridge*, [1894] 1 Ch. 351.

(*i*) *Roundel v. Currer*, 2 Bro. C. C. 67; *Robinson v. Wheelwright*, 6 De G. M. & G. 535.

(*k*) Co. Litt. 206 *a*.

(*l*) Com. Dig. *Condition*, 1; Co. Litt. 206 *a*; *Butler v. Wigge*, 1 Wins. Saund. 84; *Thornborrow v. Whiteacre*, 2 Ld. Raym. 1164; *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310.

(*m*) Com. Dig. *Condition* D. 1, *Laughter's Case*, 5 Co. 21 *b*; *Butler v. Wigge*, 1 Wins. Saund. 84; *Da Costa v. Davis*, 1 Bos. & P. 242

go over must be a wilful neglect, and that a vicar who did all in his power to get a congregation together at the church to hear prayers, and could not, was not bound to tender himself every Wednesday morning, at the church, to perform the duty, in order to save the benefits of the devise (n).

§ 1308. The Roman law, if it does not entirely coincide with the common law on the subject of conditions, is, in many respects, founded on similar considerations. If an impossible condition was annexed to a stipulation, the stipulation was, by that law, void. “*Si impossibilis conditio obligationibus adjiciatur, nihil valet stipulatio*” (o). Item; quod leges fieri prohibent, si perpetuam causam (prohibitionis) servaturum est, cessat obligatio” (p). That rule, of course, applied to the case where the condition constituted a part of the stipulation. “*Impossibilium nulla obligatio est*” (q). Pothier states the doctrine of the civil law in the following manner. The condition of a thing impossible, unlawful, or contrary to good morals, under which one promises anything, renders the act absolutely void, when it lies infeasance (*in faciendo*), and no obligation springs from it (r). As, if I have promised you a sum of money upon condition that you make a triangle without angles, or that you shall go naked through the streets (s).

§ 1309. In another place, a distinction is taken in the Roman law approaching nearer to that in the common law. “*Impossibilis conditio, cum in faciendum concipitur, stipulationibus obstat; aliter atque, si talis conditio inseratur stipulationi, si in cælum non ascenderit; nam utilis et præsens est, et pecuniam creditam continet*” (t).

§ 1310. A condition was accounted impossible in the Roman law when it consisted of a thing of which nature forbids the existence. “*Impossibilis autem conditio habetur, cui natura impedimento est, quominus existat*” (u). But a stipulation, which was not possible to be complied with by the party stipulating, but was possible to another person, was held obligatory. “*Si ab eo stipulatus sim, qui efficere non possit, quum alii possibile sit; jure factam obligationem, Sabinus scribit*” (x). The same principles were still more emphatically expounded in other places in the Digest. “*Non solum stipulationes impossibili conditione adplicatæ nullius momenti sunt; sed etiam cæteri*

(n) *Conington's Will, in re*, 6 Jur. N. S. 992. One might be allowed to question here, how far the testator's purpose depended upon the presence of a congregation. He might have supposed prayers not altogether idle, in the absence of hearers; and shall his purpose be frustrated?

(o) Inst. B. 3, tit. 20, § 11; Pothier, Pand. Lib. 45, tit. 1, nn. 40, 98.

(p) Pothier, Pand. Lib. 45, tit. 1, n. 39; Dig. Lib. 45, tit. 1, f. 35, § 1.

(q) Dig. Lib. 50, tit. 17, f. 185.

(r) Pothier, Oblig. n. 204.

(s) Ibid.

(t) Dig. Lib. 45, tit. 1, f. 7; Inst. Lib. 3, tit. 20, § 11; Pothier, Oblig. n. 204; Pothier, Pand. Lib. 45, tit. 1, n. 98.

(u) Ibid. : Inst. Lib. 3, tit. 20, § 11.

(x) Dig. Lib. 54, tit. 1, f. 137, § 5; Pothier, Pand. Lib. 45, tit. 1, n. 39.

quoque contractus (veluti emtiones locationes) impossibili conditione interpositâ, æque nullius momenti sunt. Quia in eâ re, quæ ex duorum pluriumve consensu agitur, omnium voluntas spectetur; quorum procul dubio, in hujusmodi actu talis cogitatio est, ut nihil agi existiment, appositâ eâ conditione, quam sciant esse impossibilem" (y).

§ 1311. From what has been already said, it is obvious that if a condition or covenant was possible to be performed, there was an obligation on the party, at the common law, to perform it punctiliously. If he failed so to do, it was wholly immaterial, whether the failure was by accident, or mistake, or fraud, or negligence. In either case, his responsibility dependent upon it became absolute, and his rights dependent upon it became forfeited or extinguished. Thus, for example, if a bond was made with a penalty of £1,000, upon condition, that, if £100 were paid to the obligee on or before a certain day it should be void, if it was not paid at that day, from any cause whatsoever, except the fault of the obligee, the obligation became single, and the obligor was compellable, at law, to pay the whole penalty. So, if an estate was conveyed upon condition, that, if a certain sum of money was paid to the grantee on or before a certain day, it should be void (which constituted what we will now call a mortgage), if the money was not paid at the day, the estate became (as we have seen), at law, absolute (z). So (as has already been stated), if a sale was made of an estate, to be paid for at a particular day, if the money was not paid at the day, the right of the vendee, to enforce a performance of the contract at law, was extinguished. On the other hand, if the vendor was unable or neglected, at the day appointed, to make a conveyance of the estate, the sale, as to him, became utterly incapable of being enforced at law (a).

§ 1312. Courts of equity did not hold themselves bound by such rigid rules; but they were accustomed to administer, as well as to refuse relief, in many cases of this sort, upon principles peculiar to themselves; sometimes refusing relief, and following out the strict doctrines of the common law as to the effect of conditions and conditional contracts; and sometimes granting relief upon doctrines wholly at variance with those held at the common law. It may be necessary, therefore, to consider each distinct class of cases separately; so that the principles which governed in each may be more clearly developed.

§ 1313. In the first place, as to relief in cases of penalties annexed to bonds and other instruments, the design of which is to secure the due fulfilment of the principal obligation (b). The origin of equity jurisdiction in cases of this sort, is certainly obscure, and not easily traced to any very exact source. It is highly probable, that relief was first granted

(y) Dig. Lib. 44., tit. 7, f. 31; Pothier, Pand. Lib. 45, tit. 1, n. 98.

(z) *Ante*, § § 1004, 1012.

(a) *Ante*, § § 771, 772, 776, 777.

(b) Mr. Evans, in a learned note to Pothier on Obligations (vol. 2, No. 12, pp. 81 to 111) has given a very elaborate review of the doctrine of penal obligations, to which I invite the particular attention of the reader.

upon the ground of accident, or mistake, or fraud, and was limited to cases where the breach of the condition was by the non-payment of money at the specified day. In such cases, courts of equity seem to have acted upon the ground, that by compelling the obligor to pay interest during the time of his default, the obligee would be placed in the same situation, as if the principal had been paid at the proper day. They wholly overlooked (as has been said) the consideration, that the failure of payment at that day might be attended with mischievous consequences to the obligee, which (in a rational sense) never could be cured by any subsequent payment thereof, with the addition of interest. Upon this account, the practice of affording relief in such cases has been attacked, but the authority of the decisions regretfully admitted (c).

§ 1314. But whatever may be the origin of the doctrine, it has been for a great length of time established, and is now expanded, so as to embrace a variety of cases not only where money is to be paid, but where other things are to be done, and other objects are contracted for. In short, the general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof or the damage really incurred by the non-performance (d). In every such case, the true test by which to ascertain whether relief can or cannot be had in equity is, to consider whether the parties have agreed to treat the sum mentioned as a complete satisfaction for the breach; if they have, courts of equity will refuse their peculiar remedies (e). If it is to secure the performance of some collateral act or undertaking, then courts of equity will grant relief, on the defendant paying the damages which, to the court, seem to meet the necessity of the case (f).

§ 1315. The same doctrine has been applied by courts of equity to cases of leases, where a forfeiture of the estate, and an entry for the forfeiture, is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent (g). It has also been applied to cases where a specific performance of contracts is sought to be enforced, and yet the party has not punctually performed the contract on his own part, but has been

(c) Lord Eldon, C., *Reynolds v. Pitt*, 19 Ves. 134, 140; Jessel, M.R., *Wallis v. Smith*, 21 Ch. D. 243, 257.

(d) *Logan v. Wienholt*, 1 Cl. & F. 617; *National Provincial Bank v. Marshall*, 40 Ch. D. 112; *Sloman v. Walter*, 1 Bro. C. C. 418.

(e) *French v. Macale*, 2 Dru. & War. 269.

(f) *Sloman v. Walter*, 1 Bro. C. C. 418; *Astley v. Weldon*, 2 Bos. & P. 346; *In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022; *Kilmer v. British Columbia Orchard Lands, Lim.*, [1913] A. C. 319.

(g) *Hill v. Barclay*, 18 Ves. 58; *Nokes v. Gibbon*, 3 Drew. 681.

in default (*h*). And, in cases of this sort, admitting of compensation, there is rarely any distinction allowed in courts of equity between conditions precedent and conditions subsequent; for it has been truly said, that, although the distinction between conditions precedent and conditions subsequent is known and often mentioned in courts of equity, yet the prevailing, though not the universal, distinction as to conditions there, is between cases where compensation can be made and cases where it cannot be made, without any regard to the fact whether they are conditions precedent or conditions subsequent (*i*).

§ 1316. The true foundation of the relief in equity in all these cases is, that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that, in justice, he is entitled to (*k*). And, notwithstanding the objections, which have been sometimes urged against it, this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said, that it is his own folly to have made such a stipulation, it may equally well be said, that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground, that a party having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury (*l*).

(*h*) *Ante*, §§ 771 to 778; *Hill v. Barclay*, 18 Ves. 58, 59; s.c. 16 Ves. 403, 405. See *Gregory v. Wilson*, 9 Hare, 683.

(*i*) *Taylor v. Popham*, 1 Bro. C. C. 168; *Hollinrake v. Lister*, 1 Russ. 508. See *In re Lewis*, *Lewis v. Lewis*, [1904] 2 Ch. 656, and *ante*, § 1306.

(*k*) *Peachy v. The Duke of Somerset*, 1 Str. 447, 453.

(*l*) It seems unnecessary to reproduce the contrary view of a mere question of policy, entertained by Lord Eldon, and adverted to by the learned author in a note

§ 1316a. The same principle of general justice is applied in favour of the party entitled to the security of the penalty, wherever the other party has unreasonably deprived him of his right to enforce it, until it is no longer adequate to secure his rights. In a court of equity as well as in a court of law, the penalty measured the liability of the obligor (*m*); but courts of equity will decree the obligee of a bond, interest beyond the penalty of the bond, where, by unfounded and protracted litigation, the obligor has prevented the obligee from prosecuting his claim at law for a length of time, or by some other misconduct on his part, has deprived the latter of his legal rights, when they might otherwise have been made available at law. In such cases courts of equity do no more than supply and administer, within their own jurisdiction, a substitute for the original legal rights of the obligee, of which he has been unjustifiably deprived by the misconduct of the obligor (*n*). So, if a mortgagor has given a bond with a penalty, as well as a mortgage for the security of a debt, although the creditor suing on the bond can recover no more than the penalty, even when the interest due thereon exceeds it; yet, if he sues on the mortgage, courts of equity will decree him all the interest due upon the debt, although it exceeds the penalty; for the bond is but a collateral security, and in such a case, it will not make any difference, that the mortgage is given by a surety (*o*).

§ 1317. It is not improbable that courts of equity adopted this doctrine of relief, in cases of penalties and forfeitures, from the Roman law, where it is found regularly unfolded, and sustained upon the clear principles of natural justice. The Roman law took notice, not only of conditions, strictly so called, but also of clauses of nullity and penal clauses. The former were those, in which it was agreed that a covenant should be null or void in a certain event; the latter were those where a penalty was added to a contract for non-performance of that which was stipulated (*p*). The general doctrine of that law was, that clauses of nullity and penal clauses were not to be executed according to the rigour of their terms. And, therefore, covenants were not of course dissolved, nor forfeitures or penalties positively incurred, if there was not a punctillious performance at the very time fixed by the contract. But the matter might be required to be submitted to the discretion of the proper judicial tribunal, to decide upon it according to all the circumstances of the case, and the nature and objects of the clauses (*q*). Indeed, penalties were in that

at this place. See *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 56; *Reynolds v. Pitt*, 19 Ves. 134; also the opinion of Jessel, M.R., in *Wallis v. Smith*, 21 Ch. D. 243, 257.

(*m*) *Hatton v. Harris*, [1892] A. C. 547.

(*n*) *Pulteney v. Warren*, 6 Ves. 92; *Grant v. Grant*, 3 Russ. 598.

(*o*) *Clark v. Lord Abingdon*, 17 Ves. 106.

(*p*) 1 Domat, B. 1, tit. 1, § 4, art. 18, pp. 50, 51.

(*q*) Domat, B. 1, tit. 1, § 4, art. 19, p. 51; Dig. Lib. 45, tit. 1, f. 135, § 2; id. l. 122; Pothier, Oblig. ii. 345, 349, 350.

law treated altogether, as in reason and justice they ought to be, as a mere security for the performance of the principal obligation (r).

§ 1318. But we are carefully to distinguish between cases of penalties strictly so called, and cases of liquidated damages. The latter properly occur, when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum, as the just, appropriate, and conventional amount of the damages sustained by such act or omission. In cases of this sort, especially if the damage is uncertain in amount or difficult in assessment, courts of equity will not interfere to grant relief; but will deem the parties entitled to fix their own measure of damages; provided always, that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury. But, on the other hand, courts of equity will not suffer their jurisdiction to be evaded by the fact, that the parties have called a sum damages, which is, in fact and in intent, a penalty; or because they have designedly used language and inserted provisions, which are in their nature penal, and yet have endeavoured to cover up their objects under other disguises. The principal difficulty in cases of this sort is to ascertain when the sum stated is in fact designed to be *nomine pænæ*, and when it is properly designed as liquidated damages (s).

§ 1319. In the next place, in regard to cases of forfeitures. Relying upon two cases in Vernon, a book long since acknowledged to be unreliable, the learned author made the unqualified statement that it was a universal rule in equity, never to enforce either a penalty or a forfeiture. Even in his day the latter position was unsustainable (t).

§ 1320. But there seems to be a distinction taken, in equity, between penalties and forfeitures. In the former, relief is always given, if compensation can be made; for it is deemed a mere security (u). In the latter, although compensation can be made, relief is not always given. It is true, that the rule has been often laid down, and was formerly so held, that, in all cases of penalties and forfeitures (at least upon a condition subsequent), courts of equity will relieve against the breach of the condition and the forfeiture, if compensation could be made, even although the act of omission was voluntary. The same doctrine was formerly applied in many cases of conditions precedent, where the parties could be put in the same situation as if they had been strictly performed (x).

(r) Pothier, *Oblig.* n. 341, 342, 345.

(s) *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castenada*, [1905] A. C. 6; *Webster v. Bosanquet*, [1912] A. C. 394; *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*, [1915] A. C. 79.

(t) *Ex parte Hodgson*, 19 Ves. 206; *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

(u) *Ante*, § 1314.

(x) *Ante*, § 1315.

§ 1321. But the doctrine at present maintained seems far more narrow. It is admitted, indeed, that, where the condition of forfeiture is merely a security for the non-payment of money (such as a right of re-entry upon non-payment of rent), there it is to be treated as a mere security, and in the nature of a penalty, and is accordingly relievable (*y*). But, if the forfeiture arises from the breach of conditions or covenants of a collateral nature; as, for example, of a condition against voluntary waste or of a covenant to repair; there, although compensation might be ascertained, yet it has been held that courts of equity ought not to relieve, but should leave the parties to their remedy at law (*z*).

§ 1322. It is not, perhaps, very easy to see the grounds of this distinction between these two classes of cases. It is rather stating the distinction than the reason of it, to assert, that, in the one case, the amount of damages by the non-payment of the rent is certain and fixed; in the other case, the damages are uncertain and unliquidated. But, in the case of a penalty, such a distinction is wholly repudiated; because the penalty is treated as a security. The forfeiture is also treated as a security, in cases of non-payment of rent. And in other cases of covenant, if the damages are capable of being ascertained, and will, in a legal and equitable sense, be an adequate compensation, the reason is not very clear why, under such circumstances, the forfeiture may not be equally treated as a security for such damages. The most probable ground for the distinction is, what has been judiciously hinted at, that it is a dangerous jurisdiction; that very little information upon it can be collected from the ancient cases, and scarcely any from those in modern times; that it was originally adopted in cases of penalties and forfeiture, for the breach of pecuniary covenants and conditions, upon unsound principles; and therefore, that it ought not to be extended, as it rarely works real compensation, or places the parties upon an equality and mutuality of rights and remedies (*a*). It has been further insisted, that the authorities do not bear out the proposition, that courts of equity will, in cases of forfeiture, for the breach of any covenant, give relief upon the principle of compensation (*b*).

§ 1323. Indeed, the doctrine seems now to be asserted that, in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the

(*y*) *Ante*, § 1315.

(*z*) *Peachy v. Duke of Somerset*, 1 Stra. 447; *Nokes v. Gibbon*, 3 Drew. 681.

(*a*) See the opinions expressed by Lord Eldon, in *Wadman v. Calcraft*, 10 Ves 67; *Hill v. Barclay*, 16 Ves. 403, 405; s.c. 18 Ves. 58 to 64; *Reynolds v. Pitt*, 19 Ves. 140, 141; *Ex parte Vaughan*, 1 Turn. & Russ. 434. Mr. Baron Wood's opinion in *Bracebridge v. Buckley*, 2 Price, 200, contains the reasons for the opposite doctrine, which are well worthy of consideration.

(*b*) *White v. Warner*, 2 Meriv. 459.

breach is capable of a just compensation (c). And the same rule is applied to cases where there is not only a clause for re-entry, in case of non-payment of rent, but also a proviso that, if the rent is not duly paid, the lease shall be void; for the construction put in equity upon this latter clause is that it is a mere security for the payment of the rent (d). Indeed, a strong inclination has been exhibited, even in the courts of law, to construe such a proviso, to make the lease voidable, and not absolutely void, so as to make any subsequent receipt of rent, or other act affirming the lease, to be a confirmation thereof (e).

§ 1324. Be this as it may, it is clearly established, that courts of equity will not interfere, in cases of forfeiture for the breach of covenants and conditions, where there cannot be any just compensation decreed for the breach. Thus, for example, in the case of a forfeiture for the breach of a covenant, not to assign a lease without licence, or to keep leasehold premises insured, or to renew a lease within a given time, no relief could until lately have been had; for they admit of no just compensation or clear estimate of damages (f).

§ 1324a. The power of courts of equity to relieve lessees from forfeiture for breaches of covenants in leases was enlarged by the 22 & 23 Vict. c. 35, s. 4, which gives the courts power to relieve against forfeiture for breach of a covenant to insure, where no loss or damage has happened, and the breach has been committed through accident or mistake, and an insurance has been duly effected at the time of application. But this relief can only be given once, nor can it be given at all where a forfeiture shall have been already waived out of court in favour of the person seeking the relief.

§ 1324b. Further, by the Conveyancing Act, 1881, s. 14, the rights of re-entry or forfeiture for breaches of covenant are limited. For it is provided by that Act that, previously to enforcing these rights by action or otherwise, the lessor must serve on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money. If the lessee either remedies the breach, or makes compensation in money, no right of re-entry or forfeiture will arise. Further, if the lessor proceeds to enforce his right of re-entry or forfeiture by action or otherwise, the lessee may apply to the court for relief, which the court may, having regard to all the circumstances, grant or refuse at its discretion. But the Act excludes from its operation: (1) Covenants or conditions against the assigning, underletting, parting with the possession or disposing of the land leased. (2) In case of

(c) *Barrow v. Isaacs & Son*. [1891] 1 Q. B. 417.

(d) *Bowser v. Colby*, 1 Hare, 109.

(e) *Rede v. Farr*, 6 M. & S. 121; *Doe d. Bryant v. Bancks*, 4 B. & Ald. 401; *Arnsby v. Woodward*, 6 B. & C. 519.

(f) See *Barrow v. Isaacs & Son*, [1891] 1 Q. B. 417.

a mining lease, covenants or conditions for allowing the lessor to have access to the books, or to inspect the mine. (3) And as modified by section 1 of the Conveyancing Act, 1892, postpones the right of the landlord for one year the operation of a condition for forfeiture on the bankruptcy of the lessee (including the liquidation of a trading company (*g*)), or the taking of his interest in execution. And by section 4 of the later statute the Court may relieve an underlessee from a forfeiture incurred by the act of his landlord. Each case is to be considered in regard to its own particular facts, and apart from what has been decided in other cases (*h*). The object of the statute is not to destroy the effect of a contract, and relief will be refused where there has been a wilful or persistent neglect to observe the terms of the covenant (*i*).

§ 1325. It is upon grounds somewhat similar, aided also by considerations of public policy, and the necessity of a prompt performance, in order to accomplish public or corporate objects, that courts of equity, in cases of the non-compliance by shareholders with the terms of payment of their instalments of shares at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture (*k*). The same rule is, for the same reasons, applied to cases of subscription to Government loans, where the shares of the stock are agreed to be forfeited by the want of a punctual compliance with the terms of the loan, as to the time, and mode, and place of payment (*l*). Where a power to forfeit exists the terms of the power must be strictly observed (*m*), but irregularities may be waived (*n*).

§ 1325a. And the same rule applies to contracts generally. But where the party (or his agent), who is entitled to the benefit of the forfeiture, has waived such benefit, and treated the contract as still subsisting for some purposes, he will not be allowed to insist upon the forfeiture for any purpose. As, where a life-policy was subject to a condition making it void if the assured went beyond the limits of Europe, without licence; and an assignee of the policy, on paying the premium to a local agent of the company, at the place where the insurance had been effected, informed him that the assured was resident in Canada, but the agent stated that this would not avoid the

(*g*) *Horsey Estate Co. v. Steiger*, [1899] 2 Q. B. 79.

(*h*) *Rose v. Spicer*, [1911] 2 K. B. 234; *s.c. nom. Rose v. Hyman*, [1912] A. C. 623.

(*i*) *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835; *Matthews v. Smallwood*, [1910] 1 Ch. 777; *Greville v. Parker*, [1910] A. C. 335.

(*k*) *Sparks v. Liverpool Water Works*, 13 Ves. 428. See *Sudlow v. Dutch Rhenish Railway*, 21 Beav. 43.

(*l*) *Sparks v. Liverpool Water Works*, 13 Ves. 428.

(*m*) *Clarke v. Hart*, 6 H. L. C. 633; *Garden Gully United Quartz Mining Co. v. McLister*, 1 App. Cas. 39.

(*n*) *Rule v. Jewell*, 18 Ch. D. 660; *Palmer v. Moore*, [1900] A. C. 293; *Jones v. North Vancouver Land and Improvement Co.*, [1910] A. C. 317.

policy, and received the premiums until the assured died; it was held that the company was precluded from insisting on the forfeiture (o).

§ 1326. Where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, the courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will (p). The same principle is generally (perhaps not universally) applied to cases of forfeiture founded upon the customs of manors, and the general customs of certain kinds of estates, such as copyholds; for, in all these cases, the forfeiture is treated as properly founded upon some positive law, or some customary regulations, which had their origin in sound public policy, and ought to be enforced for the general benefit (q).

(o) *Wing v. Harvey*, 5 De G. M. & G. 265.

(p) *Curtis v. Perry*, 6 Ves. 739; *Thompson v. Leake*, 1 Mad. 39.

(q) *Peachy v. Duke of Somerset*, 1 Str. 447, 452; s.c. Prec. Ch. 568, 570, 574. But see *Nash v. Earl of Derby*, 2 Vern. 537, and Mr. Raithby's note (1); *Thomas v. Porter*, 1 Ch. C. 95; *Hill v. Barclay*, 18 Ves. 64.

CHAPTER XXXIV.

INFANTS.

§ 1327. We shall next proceed to the consideration of another portion of the former exclusive jurisdiction of courts of equity, partly arising from the peculiar relation and personal character of the parties, who are the proper objects of it, and partly arising from a mixture of public and private trusts, of a large and interesting nature. The jurisdiction here alluded to, is that which is exercised over the persons and property of infants, idiots, lunatics, and married women.

§ 1328. And, in the first place, as to the jurisdiction over the persons and property of INFANTS. The origin of this jurisdiction in chancery (*a*) is very obscure, and has been a matter of much judicial discussion (*b*). The common manner of accounting for it has been thought by a learned writer to be quite unsatisfactory (*c*). It is that the king is bound by the law of common right to defend his subjects, their goods, chattels, lands, and tenements; and therefore, in the law, every royal subject is taken into the king's protection. For which reason an idiot or lunatic, who cannot defend or govern himself, or order his lands, tenements, goods, or chattels, the king, of right, as *parens patriæ*, ought to have in his custody, and rule him and them (*d*). And for the same reason, the king, as *parens patriæ*, ought to have the care of the persons and property of infants, where they have no other guardian of either (*e*).

§ 1329. The objection urged against this reasoning is, that it does not sufficiently account for the state of the former jurisdiction; for there was a marked distinction between the jurisdiction in cases of infancy, and that in cases of lunacy and idiocy. The former was exercised by the chancellor, in the Court of Chancery, as a part of the general delegation of the authority of the crown, *virtute officii*, without any special warrant; whereas the latter was exercised by him by a separate commission under the sign-manual of the king, and not otherwise (*f*). It is not safe or correct, therefore, to reason from one to the

(a) 3 Black. Comm. 427.

(b) *Wellesley v. Wellesley*, 2 Bligh N. S. 136.

(c) Hargrave's note (70) to Co. Litt. 89 a, § 16.

(d) Fitz. N. B. 232; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 118; *Beverley's Case*, 4 Co. 123, 124.

(e) *Eyre v. Countess of Shaftesbury*, 2 P. Will. 118, 119; 3 Black. Comm. 427.

(f) Co. Litt. 89 a, Hargrave's note (70), § 15; *Sheldon v. Fortescue Aland*, 3 P. Will. 104, 107, and Mr. Cox's note (A); *Sherwood v. Sanderson*, 19 Ves. 285.

other, either as to the nature of the jurisdiction or as to the practice under it (g).

§ 1330. An attempt has also been made to assign a different origin to the jurisdiction, and to sustain it, by considering guardianship as in the nature of a trust; and that, therefore, the jurisdiction has a broad and general foundation, since trusts are the peculiar objects of equity jurisdiction (h). But this has been thought to be an overstrained refinement; for, although guardianship may properly be denominated a trust, in the common acceptation of the term, yet it is not so in the technical sense in which the term is used by lawyers, or in the Court of Chancery. In the latter, trusts are invariably applied to property (and especially to real property) and not to persons (i). It may be added, that guardianship, considered as a trust, would equally be within the jurisdiction of all the courts of equity; whereas it is limited to the chancellor, sitting in chancery (k).

§ 1331. An attempt has also been made to derive the jurisdiction from the writ of *Ravishment of Ward*, and the writ *De Recto de Custodia* at the common law, but with as little success. For, independently of the consideration, that these writs were returnable into a court of common law, it is not easy to see how a jurisdiction, to decide between contending competitors for the right of guardianship, can establish a general authority, in the Court of Chancery, to appoint a guardian in all cases where one happens to be wanting (l).

§ 1332. It has been further suggested, that the appointment of guardians in cases where the infants had none, belonged to the chancellor, in the Court of Chancery, before the erection of the Court of Wards; and that, upon the abolition of that court, it reverted to the king, in his Court of Chancery, as the general protector of all the infants in the kingdom. But this (it has been objected) is rather an assertion, than a proof, of the jurisdiction; for it is difficult to trace it back to any such ancient period. The earliest instance which has been found, of the actual exercise of the jurisdiction by the chancellor, to appoint a guardian, upon petition without bill, is said to be that of Hampden, in the year 1696. Since that period, indeed, it has been constantly exercised without its once being called in question. Mr. Hargrave has not hesitated to say, that, although the jurisdiction is now unquestionable, yet it seems to have been a usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. He has added, that, although the care of infants, as well as of idiots and lunatics, should be admitted to belong to the crown; yet,

(g) *Ex parte Whitfield*, 2 Atk. 315; *Ex parte Phillips*, 19 Ves. 122.

(h) See *Duke of Beaufort v. Berty*, 1 P. Will. 705; *post*, § 1343 to 1345.

(i) Co. Litt. 89 a, Hargrave's note (70), § 17.

(k) *Ante*, § 1328; *post*, § § 1343, 1351.

(l) Co. Litt. 89 a, Hargrave's note (70), § 16.

that something further is necessary to prove that the chancellor is the person constitutionally delegated to act for the king (m).

§ 1333. Notwithstanding the objections thus urged against the legitimacy of the origin of the jurisdiction, it is highly probable that it has a just and rightful foundation in the prerogative of the crown, flowing from its general power and duty as *parens patriæ*, to protect those who have no other lawful protector (n). It has been well said, that it will scarcely be controverted, that in every civilized state, such a superintendence and protected power does somewhere exist. If it is not found to exist elsewhere, it seems to be a just inference from the known prerogatives of the crown, as *parens patriæ*, in analogous cases, to presume that it vests in the crown (o). It is no slight confirmation of this inference, that it has been constantly referred to such an origin in all the judicial investigations of the matter (p), as well as in the discussions of very learned elementary writers (q).

(m) Hargrave's note (70), § 16, Co. Litt. 89 *u*. There is very great reason to question this conclusion of the learned author; nor is it very likely that, at so late a period as 1696, a clear usurpation of an authority of this nature should have been either claimed by the chancellor or tolerated by Parliament. In Fitzherbert's *Natura Brevium* (p. 27, b), a very ancient work of great authority, it is said, that "the king, by his letters-patent, may make a general guardian for an infant, to answer for him in all actions or suits brought, or to be brought, in all manner of courts." It is added, "And the infant shall have a writ in the chancery to remove his guardian, directed unto the justices, and for to receive another, &c.; and the court, at their discretion, may remove the guardian, and appoint another guardian."

(n) The learned reader is referred to the elaborate note of Mr. Hargrave to Co. Litt. 89 *a*, note (70), § 16, for the objections to the jurisdiction, which are there fully considered; and also to the equally elaborate note of Mr. Fonblanque (2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note *a*), for the answers to those objections. The view of the matter taken in the text is almost exclusively derived from the note of Mr. Fonblanque. Lord Eldon, in *De Manneville v. De Manneville*, 10 Ves. 63, 64, after referring to the notes of Mr. Hargrave and Mr. Fonblanque, stated that "the latter had stated the principle very correctly."

(o) See *Beverley's Case*, 4 Co. 123, 124; Brac. Lib. 3, cap. 9; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 118, 123; *Stuart v. Marquis of Bute*, 9 H. L. C. 440; *In re Bourgeoise*, 41 Ch. D. 310; also 1 Mad. Pr. Ch. 262, 263.

(p) *Eyre v. Countess of Shaftesbury*, 2 P. Will. 118, 123; *Butler v. Freeman*, Ambler, 302; *Hughes v. Science*, 2 Eq. Abr. 756; *De Manneville v. De Manneville*, 10 Ves. 63, 64.

(q) 3 Black. Comm. 427; Fitz. Nat. Brev. 27; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); 1 Mad. Pr. Ch. 262, 263. In *Butler v. Freeman*, Ambler, 302, Lord Hardwicke is reported to have said, with reference to this subject: "This court does not act on the footing of guardianship or wardship. The latter is totally taken away by the statute of Charles II. And without claiming the former, and disclaiming the latter, it has a general right delegated by the crown as *pater patriæ* to interfere in particular cases for the benefit of such who are incapable to protect themselves." In the case of *Hughes v. Science*, cited in Ambler, 302, Mr. Blunt's note (2), the same learned judge said: "The law of the country has taken great care of infants, both their persons and estates, and particularly to prevent marriages to their disparagement. For that purpose it had assigned them guardians; and if a stranger married without the guardian's consent, it was considered a ravishment of ward, and the party was deemed punishable by fine and imprisonment; and so it was, if the guardian himself married the infant to another to its disparagement. And the court has originally exercised a superintendent jurisdiction over guardians in behalf of infants, to prevent abuses, either in their persons or estates, as well as in behalf of the crown,

§ 1334. Assuming, then, that the general care and superintendence of infants did originally vest in the crown, when they had no other guardian, the question by whom, and in what manner, the prerogative should be exercised, would not seem open to much controversy. Partaking, as it does, more of the nature of a judicial administration of rights and duties *in foro conscientix*, than of a strict executive authority, it would naturally follow *eâ ratione*, that it should be exercised in the Court of Chancery, as a branch of the general jurisdiction originally confided to it. Accordingly, the doctrine now commonly maintained is, that the general superintendence and protective jurisdiction of the Court of Chancery over the persons and property of infants is a delegation of the rights and duty of the crown; that it belonged to that court, and was exercised by it from its first establishment; and that this general jurisdiction was not even suspended by the statute of Henry VIII., erecting the Court of Wards and Liveries (r).

§ 1335. The jurisdiction over idiots and lunatics was distinguishable from that over infants, in several respects. The former was a personal trust in the Lord Chancellor, and especially delegated to him under the sign-manual of the king; and from his decree no appeal lay, except to the king in council (s). On the other hand, the latter belonged to the Court of Chancery, and it might be exercised as well by the Master of the Rolls as by the Lord Chancellor, and therefore an appeal lay from the decision of the Court of Chancery, in cases of infants, to the House of Lords (t).

§ 1336. It may be asked, why, if no particular warrant was necessary to enable the Court of Chancery to exercise its protective power and care over infants, a separate commission under the sign-manual should be necessary to confer on the chancellor the jurisdiction over

and inferior lords, who had formerly a great interest in the wardship of infants. Afterwards, indeed, the Court of Wards being created, took the jurisdiction out of chancery for a time. But, as soon as that court came to be dissolved, the jurisdiction devolved again upon the court, and infants have ever since been considered as under the immediate care of chancery. Whenever a suit is commenced here on their behalf, and even without suit, the court every day appoints guardians on petition; and the marriage of an infant to her guardian or any other without the consent of the court, where a suit is depending here in behalf of the infant, has been always treated and punished as a contempt. See Serj. Hill's MSS. vol. 6, p. 8." s.c. cited at large in Macpherson on Infants, Appendix I. See also Lord Eldon's remarks in *De Manneville v. De Manneville*, 10 Ves. 63, 64.

(r) 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); *Morgan v. Dillon*, 9 Mod. 139, 140; *De Manneville v. De Manneville*, 10 Ves. 52; *Wellesley v. Duke of Beaufort*, 2 Russ.; *Wellesley v. Wellesley*, 2 Bligh N. S. 124. In the case last cited Lord Redesdale adverted to the custom of London, admitted in the courts of common law to be valid, under which they made orders relative to infants of freemen, and enforced them by committing parties disobeying to Newgate, as a jurisdiction delegated by the crown anterior to the statute of Henry VIII.

(s) *Sheldon v. Fortescue Aland*, 3 P. Will. 104, 107, Mr. Cox's note (A); *Rochfort v. Earl of Ely*, 6 Bro. Parl. C. 329; *Sherwood v. Sanderson*, 19 Ves. 285; *Ex parte Phillips*, 19 Ves. 122, 123.

(t) *Ozenden v. Compton*, 2 Ves. Jun. 71, 72.

idiots and lunatics, since that also has been referred to the protecting prerogative of the crown as *parens patriæ*. The answer which has been given (and perhaps it is a true one) is, that in point of fact, the custody of the persons and property of idiots and lunatics, or at least of those who held lands, was not anciently in the crown, but in the lord of the fee. The statute (*De Prerogativâ Regis*) of 17 Edw. 2, c. 9 (or, as Lord Coke and others suppose, some earlier statute) (*u*), gave to the king the custody of idiots, and also vested in him the profits of the idiot's lands during his life (*x*). By this means the crown acquired a beneficial interest in the lands; and as a special warrant from the crown is, in all cases, necessary to any grant of its interest, the separate commission, which gives the Lord Chancellor jurisdiction over the persons and property of idiots, may be referred to this consideration (*y*). With respect to lunatics, the statute of 17 Edw. 2, c. 10, enacted, that the king should provide that their lands and tenements should be kept without waste. It conferred merely a power which is not to be considered as included within the general jurisdiction, antecedently conferred on the Court of Chancery; and therefore, a separate and special commission became necessary for the delegation of this new power (*z*). There is, under the statute, a difference between the case of an idiot, and that of a lunatic, in this respect. In the case of a lunatic, the king is a mere trustee; in the case of an idiot, he has a beneficial interest (*a*).

§ 1337. But, whatever may be the true origin of the jurisdiction of the Court of Chancery over the persons and property of infants, it is now conceded, on all sides, to be firmly established, and beyond the reach of controversy. Indeed, it is a settled maxim, that the king is the universal guardian to infants, and ought, in the Court of Chancery,

(*u*) See 2 Co. Inst. 14; 2 Reeve's Hist. ch. 12, pp. 307, 308; 1 Black. Comm. 302, 303; Fitz. N. Brev. 232.

(*x*) Lord Coke, in 2 Inst. 14, speaking of the provision in Magna Charta, ch. 4, says: "At the making of this statute the king had not any prerogative in the custody of the lands of idiots during the life of the idiots; for if he had, this act would have provided against waste, &c., committed by the committee or assignee of the king, to be done in his possessions, as well as in the possessions of wards. But at this time the guardianship of idiots, &c., was to the lords and others, according to the course of the common law." In *Beverley's Case*, 4 Co. Rep. 126, it is expressly declared, that the statute of 17 Edw. 2, c. 9, is but an affirmance or declaration of the common law. So Mr. Justice Blackstone, in his Commentaries, 1 Black. Comm. 303, treats it. Lord Coke thinks that this prerogative was given to the crown by some statute not now extant, in the reign of Edward I., after Bracton wrote his work, and before that of Britton. 2 Inst. 14. See also Lord Northington's opinion in *Ex parte Grimstone*, Ambler, 707.

(*y*) *De Manneville v. De Manneville*, 10 Ves. 63, 64; 1 Black. Comm. 303, 304.

(*z*) Lord Loughborough, in *Oxenden v. Lord Compton*, 2 Ves. Jun. 71, 72; s.c. 4 Bro. C. C. 23, considered the statute of 17 Edw. 2, c. 10, as merely in affirmance of the antecedent rights of the crown. This view was also entertained by Lord Hardwicke, *Corporation of Burford v. Lenthall*, 2 Atk. 553; *In re Heli*, 3 Atk. 635; by Lord Apsley, *Ex parte Grimstone*, Ambler, 707; and Lord Eldon, *De Manneville v. De Manneville*, 10 Ves. 63.

(*a*) *In re Fitzgerald*, 2 Sch. & Lefr. 436, in which case the difference was fully expounded by Lord Redesdale.

to take care of their fortunes (*b*). We shall now proceed to the consideration of some of the more important functions, connected with this authority; in the appointment and removal of guardians; in the maintenance of infants; in the management and disposition of the property of infants; and lastly, in the marriage of infants.

§ 1338. In the first place, in regard to the appointment and removal of guardians. The court (*c*) will appoint a suitable guardian to an infant, where there is none other, or none other who will, or can act, at least where the infant has property; for if the infant has no property, the court will perhaps not interfere. It is not, however, from any want of jurisdiction (*d*) that it will not interfere in such a case, but from the want of means to exercise its jurisdiction with effect; because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this part of its jurisdiction usefully and practically only where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infant (*e*). Guardians appointed by the court are treated as officers of the court, and are held responsible accordingly to it (*f*).

§ 1338*a*. The question of who are to be appointed guardians, is generally one of discretion, merely; and the court ordinarily refers it to a master, especially if the guardianship be contested between two or more parties, to appoint guardians, leaving the person in whose custody the infant actually is, to retain that custody until the coming in of the master's certificate. And if there are testamentary guardians, the court has no jurisdiction to interfere except in cases of misconduct (*g*). If the testamentary appointment, however, be one that contemplates the residence of the child in the country of its birth, and the child be removed to a residence in England, it seems that the Court of Chancery in England may appoint guardians; and the testamentary appointment will be looked at only as an expression of the parent's preferences, to which the court will give great influence (*h*).

§ 1339. In the next place, as to the removal of guardians. The court will not only remove guardians appointed by its own authority, but it will also remove guardians at the common law, and even testamentary or statute guardians, whenever sufficient cause can be shown for such a purpose (*i*). In all such cases, the guardianship is treated

(*b*) *Wellesley v. Duke of Beaufort*, 2 Russ. 19.

(*c*) That is, under the present practice, one of the judges of the Chancery Division of the High Court of Justice.

(*d*) *In re Fynn*, 2 De G. & Sm. 457; *Stuart v. Marquis of Bute*, 9 H. L. C. 440. See *In re Spence*, 2 Phil. 247.

(*e*) Lord Eldon, in *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 21.

(*f*) *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 20, 21; *post*, § 1351.

(*g*) *In re Neale*, 15 Beav. 250; *Coham v. Coham*, 13 Sim. 639; *Miller v. Harris*, 14 Sim. 540.

(*h*) *Johnstone v. Beattie*, 10 Cl. & F. 42; *In re Bourgeoise*, 41 Ch. D. 310.

(*i*) *Johnstone v. Beattie*, 10 Cl. & F. 42; *Wellesley v. Wellesley*, 2 Bligh N. S. 124; *Smart v. Smart*, [1892] A. C. 425.

as a delegated trust, for the benefit of the infant, and, if it is abused, or in danger of abuse, the court will interpose, not only by way of remedial justice, but of preventive justice. Where the conduct of the guardian is less reprehensible, and does not require so strong a measure as a removal, the court will, upon special application, interfere, and regulate, and direct the conduct of the guardian in regard to the custody, and education, and maintenance of the infant (*k*); and, if necessary, it will inhibit him from carrying the infant out of the country, and it will even appoint the school where he shall be educated (*l*). In like manner, it will, in proper cases, require security to be given by the guardian, if there is any danger of abuse or injury to his person or to his property (*m*).

§ 1340. The court will not only interfere to remove guardians for improper conduct, but it will also assist guardians in compelling their wards to go to the schools selected by the guardian, as well as in obtaining the custody of the persons of their wards, when they are detained from them. This may not only be done by any judge of the Supreme Court of Judicature by a writ of *habeas corpus*, but it may also be done on a petition, without any action being brought in the court (*n*).

§ 1341. The jurisdiction of the court extends to the care of the person of the infant, so far as necessary for his protection and education; and to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance (*o*). It is upon the former ground, principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents as guardians by nature, or by nurture, in regard to the custody and care of their children (*p*). For, although parents are entrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever the presumption is removed; whenever (for example) it is found, that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low

(*k*) *Roach v. Garvan*, 1 Ves. Sen. 160; *In re McCulloch*, 1 Dru. 276.

(*l*) *Campbell v. Mackay*, 2 M. & Cr. 31; *Talbot v. Duke of Shrewsbury*, 4 M. & Cr. 672.

(*m*) *Foster v. Denny*, 2 Ch. C. 237; *Hanbury v. Walker*, 3 Ch. C. 58; 1 Mad. Pr. Ch. 263, 264, 268, 269.

(*n*) *Eyre v. Countess of Shaftesbury*, 2 P. Will. 103; *Ex parte Hopkins*, 3 P. Will. 152, and Mr. Cox's note; *Da Costa v. Mellish*, West, 300; s.c. 2 Swanst. 533, 537, note.

(*o*) *In re Spence*, 2 Phil. 247.

(*p*) Mr. Hargrave, in his learned notes, 66, 67, § 123, to Co. Litt. 88 b, has brought together the general principles and doctrine, applicable to guardianship by nature, guardianship by socage, and guardianship by nurture, the first and last of which are often confounded, and used in a loose and indeterminate sense.

and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the court will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education (*q*). But it is only in cases of gross misconduct that paternal rights are interfered with. As between husband and wife, the custody of the children generally belongs to the husband, and the latter could not formerly alienate his right to the custody and care of the children (*r*).

§ 1341*a*. This subject was much considered in the case of *In re Agar-Ellis, Agar-Ellis v. Lascelles* (*s*), where it was laid down by the Court of Appeal, that a father has a legal right to control, and direct, the education and bringing up of his children, until they attain the age of twenty-one years, even although they are wards of court, and the court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude, he forfeits his rights; or (2) where he has, by his conduct, abdicated his paternal authority; or (3) where he seeks to remove his children, being wards of court, out of the jurisdiction, without the consent of the court.

§ 1342. The jurisdiction, thus asserted, to remove infant children from the custody of their parents, and to superintend their education and maintenance, is admitted to be of extreme delicacy, and of no inconsiderable embarrassment and responsibility. But it is nevertheless a jurisdiction which seems indispensable to the sound morals, the good order, and the just protection of a civilized society. In a celebrated case, after it had been acted upon in chancery for one hundred and fifty years, it was attempted to be brought into question; and was resisted, as unfounded in the true principles of English jurisprudence. It was, however, confirmed by the House of Lords, with entire unanimity; and on that occasion was sustained by a weight of authority and reasoning rarely equalled (*t*).

§ 1342*a*. In the foregoing paragraphs the author had discussed the leading principles guiding the Court of Chancery in the exercise of its inherent jurisdiction respecting the guardianship and custody of infants, subjects often confused, but quite distinct. This jurisdiction has been transferred to the Supreme Court by sections 16 and 25, sub-section 10

(*q*) The cases on this subject are numerous. *Shelley v. Westbrook*, Jac. 266; *Wellesley v. Wellesley*, 2 Bligh N. S. 134; *Anonymous*, 2 Sim. N. S. 54; *In re Besant*, 11 Ch. D. 508; *Smart v. Smart*, [1892] A. C. 425; may be cited as illustrations of the principles stated in the text.

(*r*) *Vansittart v. Vansittart*, 2 De G. & J. 249; *Swift v. Swift*, 4 De G. J. & S. 710.

(*s*) *In re Agar-Ellis, Agar-Ellis v. Lascelles*, 24 Ch. D. 317.

(*t*) *Wellesley v. Wellesley*, 2 Bligh N. S. 124.

of the Judicature Act, 1873 (*u*). These principles are still in force and are recognized and confirmed by a number of statutes which have introduced fresh considerations for the determination of the question, and to this extent have modified the judgment of the court on a given state of facts (*x*). The first statute is 2 & 3 Vict. c. 56 (commonly called Talfourd's Act), which gave the wife for the first time a right of access to the child, and enabled the court to commit the custody of the child, if under seven years, to her care (*y*). This statute was repealed, but in terms re-enacted, by the Custody of Infants Act, 1873, 36 & 37 Vict. c. 12, the main alteration being that the custody of a child under sixteen years of age may be committed to the mother, and provision is made for a right of access to the infant by either parent by order of the court (*z*). By section 2 of the same statute a provision in a separation deed that a mother shall have the custody or control of an infant is legalized, subject to the important proviso, that "no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto" (*a*). By the Guardianship of Infants Act, 1886, 49 & 50 Vict. c. 27, on the death of the father of an infant, the mother if surviving becomes the guardian of the child, either alone when the father has not appointed a guardian or jointly with any guardian appointed by the father. And the court is empowered to appoint a guardian or guardians to act jointly with the mother "if it shall think fit." The mother is also empowered to appoint a guardian to act after the death of herself and the father of an unmarried infant, and make a provisional appointment, which requires the sanction of the court, of a guardian to act jointly with the father. And the court may commit the custody of an infant to either parent with a right of access to either parent on the application of the mother, "having regard to the welfare of the infant, the conduct of the parents, and to the wishes as well of the mother as of the father." The court may now by force of the Custody of Children Act, 1891, refuse to assist a parent who has "abandoned or deserted" an infant or has otherwise been "unmindful of his parental duties," to put it shortly, to recover the custody of the infant. By section 8 of the Children Act, 1908, the powers of the court are further enlarged where the parent has been guilty of cruelty.

§ 1350. It would be a subject of curious inquiry, to ascertain the nature and extent of the parental power in the Roman law, and also the nature and extent of the powers and duties of guardians in the same law, and the manner of their appointment; but it would lead us

(*u*). *In re Goldsworthy*, 2 Q. B. D. 75.

(*x*) See *Smart v. Smart*, [1892] A. C. 425.

(*y*) *Ex parte Woodward*, 17 Jur. 56.

(*z*) *In re Elderton (Infants)*, 25 Ch. D. 220.

(*a*) *In re Besant*, 11 Ch. D. 508; *Besant v. Wood*, 12 Ch. D. 605; *Hart v. Hart*, 18 Ch. D. 670.

too far from the immediate object of these Commentaries. It is highly probable that the common law, as well as the equity jurisprudence of England, has borrowed many of its doctrines on this subject from this source. Guardians (who were appointed on the death of the father) were, in the Roman law, of two sorts: (1) tutors, who were guardians of males until their age of fourteen years, and of females until their age of twelve years; and (2) curators, who were then appointed their guardians, and continued such until the minors respectively arrived at the age of twenty-five years, which was the full majority of the Roman law. Guardians were usually selected from the nearest relations, and might be nominated by the father or mother during their lifetime. But they were required to be appointed and confirmed by the proper judge or magistrate of the place where the minor resided; and they were removable for personal misconduct, or for ill-treatment of the minor, or for bad management of his estate. But, while any one remained guardian, he was bound to take care of the person of the minor; to provide suitable maintenance out of his estate; to superintend his morals and education; and to exercise a prudent management over his estate (b). In many respects, indeed, the court, in the exercise of its authority over infants, implicitly follows the very dictates of the Roman code.

§ 1351. It might seem, upon principle, that the jurisdiction of the court over infants ought not to have been confined to cases where a suit is depending for property in that court. It would seem to belong to the Court of Chancery, as the general delegate of the crown, acting as *parens patriæ*, for the protection of the persons and property of those who are unable to take care of themselves, and yet possess the means of maintenance, and are without any other suitable guardian; and upon that ground, that it ought to reach all cases where the person or the property of the infant required the protection of the court, without any inquiry whether there was a ground for actual litigation or not. But, in practice, it seems to have been limited to cases where an action is actually pending, even when the whole *gravamen* of the action is a mere fiction (c).

§ 1352. We are next led to the consideration of what constitutes an infant a ward of court, in respect to whom the court interferes in a great variety of cases, when it would not, if the infant did not stand

(b) Inst. Lib. 1, tit. 20 to 26.

(c) It often occurs, that a bill is filed for the sole purpose of making an infant a ward of chancery; but in such a case the bill always states, however untruly, that the infant has property within the jurisdiction, and the bill is brought against the person in whose supposed custody or power the property is. *Johnstone v. Beattie*, 10 Cl. & F. 42. Why such a mere fiction should be resorted to, has never, as it seems to me, been satisfactorily explained; and why the Lord Chancellor, exercising the prerogative of the crown as *parens patriæ*, might not, in his discretion, appoint a guardian to an infant, having no other guardian, without any bill being filed, seems difficult to understand upon principle. But the practice seems founded upon narrower ground.

in that predicament in relation to the court. Properly speaking, a ward of court is a person who is under a guardian appointed by the court (*d*). But, wherever an action is brought relative to the person or property of an infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance and protection. But unless there is some actual litigation to which the infant is a party, a proceeding relative to an infant's property will not constitute him a ward of court (*e*).

§ 1353. In all cases where an infant is a ward of court, no act can be done affecting the person, or property, or state of the minor, unless under the express or implied direction of the court itself. Every act done without such direction is treated as a violation of the authority of the court, and the offending party will be arrested upon the proper process for the contempt, and compelled to submit to such orders and such punishment by imprisonment, as are applied to other cases of contempt. Thus, for example, it is a contempt of court to conceal or withdraw the person of the infant from the proper custody (*f*); to disobey the orders of the court in relation to the maintenance or education of the infant; or to marry the infant without the proper consent or approbation of the court. Of the latter more will be presently stated (*g*). Indeed, when once the court has thus directly or indirectly assumed authority over the person or property of an infant, as its ward, it acts throughout with all the anxious care and vigilance of a parent; and it allows neither the guardian, nor any other person, to do any act injurious to the rights or interests of the infant.

§ 1354. In the next place, in regard to the maintenance of infants. Whenever the infant is a ward of court and an action is pending in the court, the court will, of course, direct a suitable maintenance for the infant, having a due regard to the rank, the future expectations, the intended profession or employment, and the property of the latter. But, where there is already a guardian in existence, not deriving his authority from the court, and where there is no action in the court touching the infant or his property, there formerly existed a doubt whether the court could interfere summarily to direct a suitable maintenance of the latter. The effect of this doubt was to allow the guardian to exercise his discretion at his own peril; and thus to leave much to his sense of duty, and much more to his habits of bold or of timid action in assuming responsibility. At present, the practice

(*d*) *Johnstone v. Beattie*, 10 Cl. & F. 42; *Stuart v. Marquis of Bute*, 9 H. L. C. 440; *Gynn v. Gilbard*, 1 Dr. & Sm. 356; *In re Hodges*, 3 K. & J. 213; *In re Graham*, L. R. 10 Eq. 530.

(*e*) *In re Dalton*, 6 De G. M. & G. 201; *In re Hillary*, 2 Dr. & Sm. 461; *Ex parte Brewer*, 2 Dr. & Sm. 552; *Brown v. Collins*, 25 Ch. D. 56.

(*f*) *Wellesley's Case*, 2 Russ. & M. 159; *Ramsbotham v. Senior*, L. R. 8 Eq. 575.

(*g*) *Post*, § 1358.

which grew up of entertaining such an application without a formal suit is adopted, the procedure being by summonses in chambers (*h*).

§ 1354*a*. But, in regard to the maintenance of infants out of their own property, it is important to differentiate between two classes of cases, one where there is a trust for maintenance, and the other a power for maintenance. In the first case the father is entitled to have the income paid to him irrespective of his ability to maintain the infant children, and in the second his right is measured by his ability to maintain them, unless the trustees are empowered to apply the income in the maintenance of the infant children, and exercise that power in fact (*i*). In an exceptional case, the court has allowed maintenance to a father of large independent means (*k*). Another category must also be borne in mind. Where a maintenance clause fixes a sum to be allowed and directs the surplus income to be accumulated, the court may exceed the sum so fixed if a special case be made justifying the increase, unless there are additional words restricting the right to exceed that allowance (*l*). A mother is not regarded as bound to support her infant children, and maintenance is allowed irrespective of her ability (*m*).

§ 1354*b*. The court, also, is not limited in its authority, in regard to maintenance, to cases where the infant is resident within the territorial jurisdiction of the court, or the maintenance is to be applied there. But in suitable cases, and under suitable circumstances, it will order maintenance for an infant out of the jurisdiction, taking care to impose such conditions and restrictions on the party applying for it as will secure a proper application of the money (*n*).

§ 1355. In allowing maintenance, the court will have a liberal regard to the circumstances and state of the family to which the infant belongs; as, for example, if the infant be an elder son, and the younger children have no provision made for them, an ample allowance will be allowed to the infant, so that the younger children may be maintained (*o*); or for the support of an illegitimate brother (*p*). Similar considerations will apply if a father of an infant is in distress or narrow circumstances (*q*). On the other hand, in allowing maintenance, the court usually confines itself within the limits of the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, the court will sometimes allow the capital to be broken

(*h*) Rules of the Supreme Court, 1883 Order L.V. r. 2 (12).

(*i*) *Brophy v. Bellamy*, L. R. 8 Ch. 798; *Wilson v. Turner*, 22 Ch. D. 521.

(*k*) *Jervoise v. Silk*, G. Coop. 52.

(*l*) *In re Walker, Walker v. Duncombe*, [1901] 1 Ch. 879.

(*m*) *Haley v. Bannister*, 4 Mad. 275; *Douglas v. Andrews*, 12 Beav. 310.

(*n*) *Stephens v. James*, 1 Myl. & K. 627.

(*o*) *Lanoy v. Duke of Athol*, 2 Atk. 447; *Burnet v. Burnet*, 1 Bro. C. C. 179, and Mr. Belt's note.

(*p*) *Bradshaw v. Bradshaw*, 1 Jac. & W. 647. (*q*) *Allen v. Coster*, 1 Beav. 201.

in upon (r). But, without the express sanction of the court, a trustee or guardian will not be permitted, of his own accord, to break in upon the capital (s).

§ 1355a. By Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 23, it was provided that, in all cases where any property is held by trustees, in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education (t) of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not; and such trustees shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income therefrom in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen; provided always that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year. These provisions are in substance re-enacted by the Conveyancing Act, 1881, s. 43, sub-ss. 1, 2, and 3. But they may be excluded by a contrary intention expressed in the instrument. The intermediate income of a contingent gift cannot be applied under the section, unless the infant will become absolutely entitled to the income as an accretion to the capital (u). But where the capital is given to members of a class who shall attain twenty-one, as each has an equal chance of sharing in the fund when it becomes devisable, maintenance may be given (x).

§ 1356. In the next place, in regard to the management and disposal of the property of infants. And here, the court will exercise a vigilant care over guardians in the management of the property of the infant.

§ 1357. Guardians should not change the personal property of the infant into real property, or the real property into personalty; since it may not only affect the rights of the infant himself, but also his representatives, if he should die under age, unless it is manifestly

(r) *Bridge v. Brown*, 1 Y. & C. Ch. 181; *Ex parte Hays*, 3 De G. & Sm. 485; *In re Welch*, 23 L. J. Ch. 344.

(s) *Walker v. Wetherell*, 6 Ves. 474.

(t) In the Conveyancing Act, 1881, s. 43, sub-s. 2, the word *benefit* is added.

(u) *In re Dickson, Hill v. Grant*, 29 Ch. D. 331; *In re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685.

(x) *In re Holford, Holford v. Holford*, [1894] 3 Ch. 30; *In re Jeffery, Arnold v. Burt*, [1895] 2 Ch. 557.

for the benefit of the infant, change the nature of the estate; and the court will support their conduct, if the act be such as the court itself would have done, under the like circumstances, by its own order. The act of the guardian, in such a case, must not be wantonly done; but it must be for the manifest interest and convenience of the infant (*y*). And when the court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state (*z*).

§ 1358. In the next place, in regard to the marriage of infants. This is a most important and delicate duty of the court, which it exercises with great caution in relation to all persons who are wards of court. No person is permitted to marry a ward of court without the express sanction of the court, even with the consent of the guardian. If a man should marry a female ward without the consent and approbation of the court, he (*a*), and all others concerned in aiding and abetting the act (*b*), will be treated as guilty of a contempt of the court; and the husband himself, even though he were ignorant that she was a ward of court, will still be deemed guilty of a contempt (*c*).

§ 1359. In all cases where the court appoints a guardian, or committee in the nature of a guardian, to have the care of an infant, it is accustomed to require the party to give a recognizance that the infant shall not marry without the leave of the court; which form is rarely altered, and only upon special circumstances. So that, if an infant should marry, though without the privity, or knowledge, or neglect of the guardian, or committee; yet the recognizance would in strictness be forfeited, whatever favour the court might, upon an application, think fit to extend to the party, when he should appear to have been in no fault (*d*).

§ 1360. With a view, also, to prevent the improper marriages of its wards, the court will, where there is reason to suspect an intended and improper marriage without its sanction, by an injunction, not only interdict the marriage, but also interdict communications between the ward and the admirer; and if the guardian is suspected of any

(*y*) *Inwood v. Twyne*, Ambler 417, and Mr. Blunt's note; s.c. 2 Eden 148, and Mr. Eden's note. The rule seems now to be, that it is the duty of the court to preserve the estates of all infants in the condition in which the ancestor has left them, unless some *overwhelming necessity* is shown for conversion. *Marquis Camden v. Murray*, 16 Ch. D. 161, at p. 171.

(*z*) *Ware v. Polhill*, 11 Ves. 257; *Ex parte Phillips*, 19 Ves. 118; *Webb v. Lord Shaftesbury*, 6 Mad. 100.

(*a*) *Bathurst v. Murray*, 8 Ves. 74; *Field v. Brown*, 17 Beav. 146; *Cox v. Bennett*, 31 L. T. 83.

(*b*) *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103, 112; *More v. More*, 2 Atk. 157; *Priestley v. Lamb*, 6 Ves. 421.

(*c*) *Eyre v. Countess of Shaftesbury*, 2 P. Will. 103.

(*d*) *Eyre v. Countess of Shaftesbury*, 2 P. Will. 112; *Dr. Davis's Case*, 1 P. Will. 698.

connivance, it will remove the infant from his care and custody, and place the infant under the care and custody of a committee (e). Lord Hardwicke has justly remarked, that this jurisdiction is highly important in its exercise under both of these aspects; in the first place, when it is exercised by way of punishment of such as have done any act to the prejudice of the ward; in the next place, by the still more salutary and useful exercise, by way of prevention, when it restrains persons from doing any act to disparage the ward, before the act has been completed (f). But the court has no jurisdiction to compel an infant ward of court to make a settlement of his own property because he has been guilty of contempt in marrying without leave (g).

§ 1361. In case of an offer of marriage of a ward, the court will refer it to a master, to ascertain and report, whether the match is a suitable one, and also what settlement ought to be made. And where a marriage has been actually celebrated without the sanction of the court, the court will not discharge the husband, who has been committed for the contempt, until he has actually made such a settlement upon the female ward, as, upon a reference to a master, shall, under all the circumstances, be deemed equitable and proper. One important consideration is whether there has been any circumstance of aggravation (h). If there has been, the husband will be excluded from all direct benefit under the settlement, but a general power to the wife to appoint by will in case of default of issue is a proper provision, although the husband might ultimately derive an interest in the wife's property (i). It will not make any difference in the case, that the ward has since arrived of age, or is ready to waive her right to a settlement; for the court will protect her against her own indiscretion, and the undue influence of her husband (k).

§ 1361b. The court refuses to interfere with the custody of foreign guardians and their control of their wards, upon mere grounds of expediency and advantage to the wards. If there is English property belonging to the wards, English guardians will be appointed to supplement the office and duty of the foreign guardians, in case of neglect or abuse, and to bring the matter before the court for proper directions. But no interference with the control of the person of the wards by the foreign guardians will be allowed until some case of abuse is shown. The court will not in such case entertain any question of the preference of the wards and the greater advantage to them of English control or education (l).

(e) *Smith v. Smith*, 3 Atk. 304; *Pearce v. Crutchfield*, 14 Ves. 206.

(f) *Smith v. Smith*, 3 Atk. 305.

(g) *In re Leigh v. Leigh*, 49 Ch. D. 290.

(h) *Bathurst v. Murray*, 8 Ves. 74; *Anon.*, 4 Russ. 473.

(i) *Att.-Gen. v. Lucas*, 2 Ph. 753; *In re Sampson v. Wall*, 25 Ch. D. 482.

(k) *Stevens v. Savage*, 1 Ves. Jun. 154.

(l) *Daniel v. Newton*, 8 Beav. 485; *In re Dawson, Dawson v. Jay*, 2 Sm. & G. 199; *Nugent v. Vetsera*, L. R. 2 Eq. 704; *In re Bourgoise*, 41 Ch. D. 610.

CHAPTER XXXV.

IDIOTS AND LUNATICS.

§ 1362. WITH this brief exposition of the jurisdiction and doctrines of the Court of Chancery, in regard to infants, we may dismiss the subject and proceed to the consideration of the jurisdiction in relation to IDIOTS and LUNATICS. The remarks, which have been already made, to distinguish the jurisdiction of the court in this class of cases from that exercised in cases of infants, have, in a great measure, anticipated, and brought under discussion, the explanations proper for this place (*a*). If the preceding views of this subject are correct, the Court of Chancery might properly have been deemed to have had, originally, as the general delegate of the authority of the crown, as *parens patriæ*, the right, not only to have the custody and protection of infants, but also of idiots and lunatics, when they have no other guardian. But this claim to an original jurisdiction had been discountenanced judicially by Lord Loughborough (*b*) and Lord Eldon (*c*), who have pointed out that the delegation to the Lord Chancellor was only for the purposes of administration; and the choice of that officer accidental and not compulsory. Since 1851, the Lords Justices have been appointed under the royal sign-manual, and by the Lunacy Act, 1890, 53 Vict. c. 5, sec. 108, the delegates of the crown are to be chosen among the holders of the Great Seal or the Judges of the Supreme Court (*d*).

§ 1363. But the statute of 17 Ed. 2, cc. 9, 10, introduced some new rights, powers, and duties of the crown; and since that period, the jurisdiction is not the same as in the case of infants, nor are the doctrines of the judge the same in all respects. Still, for the most part, they agree in substance; and, in a work like the present, there would be little utility in a more minute and comprehensive enumeration of the distinctions and differences between them.

§ 1364. But whatever may be the true origin of the authority of the crown, as to idiots and lunatics, the judges of the Court of Lunacy do not at the present day act, in all cases, under the special warrant by the sign-manual, but the jurisdiction and procedure are regulated by statute—the Lunacy Act, 1890, 53 Vict. c. 5 and

(*a*) *Ante*, § 1334 to 1336.

(*b*) *Oxenden v. Lord Compton*, 2 Ves. Jun. 72.

(*c*) *Ex parte Phillips*, 19 Ves. 118; *Sherwood v. Sanderson*, 19 Ves. 280.

(*d*) *In re Cathcart*, [1893] 1 Ch. 466.

amending statute. The statute empowers the court to provide for the maintenance of idiots and lunatics, and for the care of their persons and estates; and no more (e). When a person is ascertained to be an idiot or lunatic (f), the court proceeds to commit the custody of the person and estate of the idiot or lunatic, sometimes to the same person, and sometimes to different persons, according to circumstances, and to direct for him a suitable maintenance (g). It is usual to take bond from the committees to account and submit to the orders of the court; but it is not absolutely necessary so to do (h).

§ 1364a. By the present construction of 3 & 4 Will. 4, c. 74, the Lord Chancellor has authority to give consent, on the part of a lunatic, tenant in tail in possession, that the first tenant in tail in remainder may bar the subsequent limitations, on a proper case being made out for the exercise of that authority (i). In the case of a devise of real and personal estate, to trustees, to apply the whole, or any part of the rents, to the maintenance of an imbecile person, it was held that the trustees could not interpose that discretionary power to oust the jurisdiction of the court; and that the trust was in exoneration of the private property of the *cestui que trust*, so that his personal representative might claim to have recouped out of the income of the trust property any sum which he may have applied out of the private property of the imbecile towards his maintenance (k).

§ 1365. In regard to the manner of ascertaining whether a person is an idiot or lunatic, or not, a few words will suffice. Upon a proper petition, a commission issues out of lunacy, on which the inquiry is to be made, as to the asserted idiocy or lunacy of the party (l). The inquisition is always had and the question tried by a jury, or before a master in lunacy, whose unimpeached verdict becomes conclusive upon the fact. The commission is not confined to idiots or lunatics, strictly so called; but in modern times it is extended to all persons who, from disease or age, are incapable of managing their

(e) *Lysaght v. Royse*, 2 Sch. & Lefr. 153. In order that the chancellor should deal with the property of a lunatic at all, it is necessary that a commission should be taken out, or that the lunatic should be a party in a cause; otherwise the court has no jurisdiction. *Gilbee v. Gilbee*, 1 Phil. 121.

(f) As to the jurisdiction of chancery to interfere for the protection of a lunatic not found so by inquisition, see *Nelson v. Duncombe*, 9 Beav. 211.

(g) *Dormer's Case*, 2 P. Will. 263; *Sheldon v. Fortescue Aland*, 3 P. Will. 110; *Lysaght v. Royse*, 2 Sch. & Lefr. 153; *Ex parte Chumley*, 1 Ves. Jun. 296; *Ex parte Baker*, 6 Ves. 8; *Ex parte Pickard*, 3 Ves. & B. 127; *In re Webb*, 2 Phil. 10.

(h) *In re Frank*, 2 Russ. 450; *In re Burroughs*, 2 Dru. & War. 207; *Ex parte Mount*, 21 L. J. Ch. 221.

(i) *In re Blewitt*, 6 De G. M. & G. 187; *In re Wynne*, L. R. 7 Ch. 229. And property falling to a lunatic will be applied to past maintenance, though no inquisition had been had. *In re Gibson*, L. R. 7 Ch. 52. So, income of the separate estate of a married woman may be applied to her support when lunatic. *In re Baker's Trusts*, L. R. 13 Eq. 168.

(k) *In re Sanderson's Trusts*, 3 Kay & J. 497.

(l) Lunacy Act, 1890, Part III.

own affairs, and therefore are properly deemed of unsound mind, or *non compotes mentis* (*m*).

§ 1365*a*. The jurisdiction of the court over lunatics is not confined to lunatics domiciled within the country; but a commission of lunacy may issue where the lunatic has lands or other property within the State, although he is domiciled abroad (*n*).

(*m*) Lunacy Act, 1890, sect. 116, sub-s. 1 (*d*).

(*n*) Lunacy Act, 1890, sects. 90, 96. *Southcote's Case*, 2 Ves. Sen. 402.

CHAPTER XXXVI.

MARRIED WOMEN.

§ 1366. We may next proceed to the consideration of the peculiar jurisdiction exercised by courts of equity, in regard to the persons and property of MARRIED WOMEN; and, principally, in regard to their property. It is not our design, in these Commentaries, to enter upon any consideration of the general doctrines relative to the rights, duties, powers, and interests of husband and wife, which are recognised at the common law. That would properly belong to a treatise of a very different nature. It will be sufficient, for our present purpose, to examine those particulars only which are peculiar to courts of equity, or in which a remedial justice is applied by them beyond, or unknown to, the common law. Although these doctrines are for the most part rendered obsolete by the operation of the Married Women's Property Act, 1882, from their historical importance it is considered advisable to retain them in the text.

§ 1367. It is well known that, at the common law, husband and wife were treated, for most purposes, as one person; that is to say, the very being or legal existence of the woman, as a distinct person, was suspended during the marriage, or, at least, was incorporated and consolidated with that of her husband. Upon this principle, of the union of person in husband and wife, depended almost all the legal rights, duties, and disabilities which either of them acquired by or during the marriage (*a*). For this reason, a man could not grant anything to his wife, or enter into a covenant with her; for the grant would have supposed her to possess a distinct and separate existence. And, therefore, it was also generally true, that contracts made between husband and wife, when single, were avoided by the intermarriage (*b*). Upon the same ground it is, that, if the wife were injured in her person or property during the marriage, she could bring no action for redress without the concurrence of her husband, neither could she be sued, without making her husband also a party in the cause (*c*). All this is very different in the civil law, where the husband and wife are considered as two distinct persons; and may have separate

(*a*) 1 Black. Comm. 442. I have qualified Blackstone's text by adding the words, "for most purposes;" for, in some respects, even at law, she is treated as a distinct person; as, for example, she may commit crimes separately from her husband; she may act as an attorney for him, or for others; she may levy a fine; she may swear articles of peace against him.

(*b*) 1 Black. Comm. 442.

(*c*) 1 Black. Comm. 443.

estates, contracts, debts, and injuries (*d*); and may also, by agreement with each other, have a community of interest, in the nature of a partnership.

§ 1368. Now, in courts of equity, although the principles of law, in regard to husband and wife, were recognised and not interfered with actively, yet they were not exclusively considered. On the contrary, courts of equity, for many purposes, treated the husband and wife as the civil law treats them, as distinct persons, capable (in a limited sense) of contracting with each other, of suing each other, and of having separate estates, debts, and interests (*e*). A wife might, in a court of equity, sue her husband, and be sued by him (*f*). And in cases respecting her separate estate, she might also be sued without him (*g*); although he was ordinarily required to be joined for the sake of conformity to the rule of law, as a nominal party, whenever he was within the jurisdiction of the court, and could be made a party (*h*).

§ 1369. In the further illustration of this subject, we shall consider, first, the cases in which contracts between husband and wife would be recognised and enforced in equity; secondly, the manner in which a wife might acquire a separate estate, and her powers and interest therein; thirdly, the equity of the wife to a settlement out of her own property, not reduced into the possession of her husband; and, fourthly, her claim in equity for maintenance and alimony.

§ 1370. And first, in regard to contracts between husband and wife. By the general rules of law, as has been already stated, the contracts made between husband and wife before marriage became, by their matrimonial union, utterly extinguished (*i*). Thus, for example, if a man should give a bond to his wife, or a wife to her husband, before marriage, the contract created thereby would, at law, be discharged by the intermarriage (*k*). Courts of equity, although they generally followed the same doctrine, would, in special cases, in furtherance of the manifest intentions and objects of the parties, carry into effect such a contract made before marriage between husband and wife, although it would be avoided at law (*l*). An agreement, therefore, entered into by husband and wife, before marriage, for the mutual settlement of their estates, or of the estate of either upon the other, upon the marriage, even without the intervention of trustees, would be enforced in equity, although void at law; for

(*d*) 1 Black. Comm. 444.

(*e*) *Woodward v. Woodward*, 3 De G. J. & S. 672; *Butler v. Butler*, 16 Q. B. D. 831.

(*f*) *Cannel v. Buckle*, 2 P. Will. 243, 244.

(*g*) *Dubois v. Hole*, 2 Vern. 613, and Mr. Raithby's note (1).

(*h*) See *Lillia v. Airey*, 1 Ves. Jun. 278.

(*i*) Co. Litt. 112a, 187b.

(*k*) Com. Dig. *Baron & Feme*, D. 1; Cro. Car. 551; Co. Litt. 264b.

(*l*) *Rippon v. Dawding*, Ambler 566, and Mr. Blunt's note.

equity would not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract (*m*). On this ground, where a wife, before marriage, gave a bond to her intended husband, that, in case the marriage took effect, she would convey her estate to him in fee, the bond was, after the marriage, carried into effect in equity, although it was discharged at law. Upon that occasion Lord Macclesfield, L.C., said: "It is unreasonable that the intermarriage, upon which alone the bond was to take effect, should itself be a destruction of the bond. And the foundation of that notion is, that at law the husband and wife, being one person, the husband cannot sue the wife on this agreement; whereas, in equity, it is constant experience that the husband may sue the wife, or the wife the husband; and the husband might sue the wife upon this very agreement" (*n*).

§ 1371. If a debt were by specialty, then owing to a technicality based upon a formal procedure (*o*), a widow might pursue her remedies at law against the personal representatives of a covenantor with whom she had subsequently intermarried, as in the case of a bond to leave her a sum of money by will (*p*), or a covenant to pay an annuity (*q*). The reason being that there no longer existed any objection to parties at the time of action brought (*r*). *A fortiori*, such an agreement would be specifically decreed in a court of equity (*s*). Therefore, where a husband covenanted before marriage with his intended wife, that she should have power to dispose of £300 of her estate, he was afterwards held bound specifically to perform it (*t*). The wife might even execute a power to dispose of property so reserved to her, in favour of her husband. Since the Married Women's Property Act, 1882, these ante-nuptial contracts between man and woman would have full force to them whether in equity or at law.

§ 1372. In regard to contracts made between husband and wife after marriage, *à fortiori* the principles of the common law applied to pronounce them a mere nullity; for there was deemed to be a positive incapacity in each to contract with the other. But here again, although courts of equity followed the law, they could, under particular circumstances, give full effect and validity to post-nuptial contracts. Thus, for example, if a wife, having a separate estate,

(*m*) *Moore v. Ellis*, Bunb. 205; *Fursor v. Penton*, 1 Vern. 408; *Cotton v. Cotton*, Prec. Ch. 41; s.c. 2 Vern. 290, and Mr. Raithby's note.

(*n*) *Cannel v. Buckle*, 2 P. Will. 243, 244; s.c. 8 Eden, 252 to 254.

(*o*) *Schlencker v. Moxsy*, 3 B. & C. 789; *Baber v. Harris*, 9 A. & E. 532.

(*p*) *Gage v. Acton*, 1 Salk. 325; s.c. 1 Ld. Raym. 516; *Milbourn v. Ewart*, 5 T. R. 381.

(*q*) *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83.

(*r*) See *Rose v. Poulton*, 2 B. & Ad. 822.

(*s*) *Rippon v. Dawding*, Ambler 566, and Mr. Blunt's note; *Prebble v. Boghurst*, 1 Swanst. 309.

(*t*) *Fursor v. Penton*, 1 Vern. 408, and Mr. Raithby's note; *Wright v. Cadogan*, 2 Eden, 252.

should, *bona fide*, enter into a contract with her husband, to make him a certain allowance out of the income of such separate estate for a reasonable consideration, the contract, although void at law, was obligatory, and has been enforced in equity (*u*). So, if the husband should, after marriage, for good reasons have contracted with his wife, that she should separately possess and enjoy property bequeathed to her, the contract would have been upheld in equity (*x*). So, if a husband and wife for a *bona fide* and valuable consideration, should have agreed that he should purchase land and build a house thereon for her, and she should pay him therefor out of the proceeds of her own real estate; if he should perform the contract on his side, she also would have been compelled to perform it on her side (*y*). Nay, if an estate were devised to a husband for the separate use of his wife, it was considered as a trust for the wife, and he would be compelled to perform it (*z*).

§ 1373. It was upon similar grounds, that a wife might become a creditor of her husband, by acts and contracts during marriage; and her rights, as such, would be enforced against him and his representatives. Thus, for example, if a wife should have united with her husband to pledge her estate, or otherwise to raise a sum of money out of it to pay his debts, or to answer his necessities, whatever might be the mode adopted to carry that purpose into effect, the transaction would, in equity, have been treated according to the true intent of the parties. She was deemed a creditor or a surety for him (if so originally understood between them) for the sum so paid; and she was entitled to reimbursement out of his estate, and to the like privileges as belong to other creditors (*a*).

§ 1374. In respect also to gifts or grants of property by a husband to his wife after marriage, they were, ordinarily (but not universally), void at law. But courts of equity would uphold them in many cases where they were held void at law; although, in other cases, the rule of law was recognised and enforced. Thus, for example, if a husband should, by deed, have granted all his estate or property to his wife, the deed was held inoperative in equity, as it would be in law; for it could in no just sense be deemed a reasonable provision for her (which was all that courts of equity held the wife entitled to); and, in giving her the whole, he would surrender all his own interest (*b*).

(*u*) *More v. Freeman*, Bunb. 205.

(*x*) *Harvey v. Harvey*, 1 P. Will. 125, 126; s.c. 2 Vern. 659, 760, and Mr. Raithby's note.

(*y*) *Townshend v. Windham*, 2 Ves. Sen. 7.

(*z*) *Darley v. Darley*, 3 Atk. 399; *Rich v. Cockell*, 9 Ves. 375; *post*, § 1380.

(*a*) *Jackson v. Innes*, 1 Bligh, 104. See now the Married Women's Property Act, s. 3.

(*b*) *Beard v. Beard*, 3 Atk. 71.

§ 1375. But, on the other hand, if the nature and circumstances of the gift or grant, whether it be express or implied, were such that there was no ground to suspect fraud, and it amounted only to a reasonable provision for the wife, it would, even though made after coverture, be sustained in equity (c). Thus, for example, gifts, made by the husband to the wife during the coverture, to purchase clothes, or personal ornaments, or for her separate expenditure (commonly called pin-money), and personal savings and profits made by her in her domestic management, which the husband allowed her to apply to her own separate use (d), were held to vest in her, as against her husband (but not as against his creditors), an unimpeachable right of property therein, as her exclusive and separate estate (e). It is true that courts of equity required evidence to establish such gifts as a matter of intention and fact; but, when that was established, full effect will be given to them (ee).

§ 1375a. Pin-money is a very peculiar sort of gift for a particular purpose and object, and, whether it is secured by a settlement or otherwise, it is still required to be applied to those purposes and objects (f). It is not deemed to be an absolute gift, or, as it is sometimes said, out and out, by the husband to the wife. It is not considered like money set apart for the sole and separate use of the wife during coverture, excluding the *jus mariti*. But it is a sum set apart for a specific purpose, due, or given to, the wife, in virtue of a particular arrangement, payable and paid by the husband in virtue of that arrangement, and for that specific purpose. Pin-money is a sum paid in respect to the personal expense of his wife, for her dress and pocket-money; and hence, as the very name seems to import, it has a connection with her person, and is to deck and attire it. The husband, therefore, as well as the wife, may be said to have an interest in it; for the wife is to dress (it has been said) according to his rank, and not her own. It is upon this ground that courts of equity refuse to go back to call upon the husband to pay beyond the arrears of a year, although stipulated for by a marriage settlement; for the money is meant to dress the wife during the year, so as to keep up the dignity of the husband, and not for the accumulation of the fund. This provides a check and control to the husband. It prevents the wife from misspending the money. It secures the appropriation of the money to its natural and original purpose. It is with this view, quite as much as on account of the presumed satisfaction by acquiescence, that courts of equity have established

(c) *Walter v. Hodge*, 2 Swanst. 106, 107; *Lucas v. Lucas*, 1 Atk. 270, 271.

(d) *Slanning v. Style*, 3 P. Will. 337.

(e) *Sir Paul Neal's case*, cited in Prec. Ch. 44; *Lucas v. Lucas*, 1 Atk. 270; *Graham v. Londonderry*, 3 Atk. 393 to 395.

(ee) *Lloyd v. Pughe*, L. R. 8 Ch. 88.

(f) *Jodrell v. Jodrell*, 9 Beav. 45

the principle above stated, not to allow the wife to claim pin-money beyond the year. On the same ground it is, that the personal representatives of the wife are not allowed to make any claim for the arrears of pin-money, not even for arrears of a year; for the allowance has a sole regard to the personal dress and expenses of the wife herself during that period. And hence, also, it is, that if the wife becomes insane, and remains so until her death, if the husband has maintained her, and taken suitable care of her, according to her rank and condition, courts of equity will not allow her personal representatives to make any claim for any arrearages of pin-money, even secured by a marriage settlement (*g*).

§ 1376. Under the like consideration, in a great measure, falls the right of the wife to her paraphernalia; a term originally of Greek derivation (where it means something reserved over and above dower, or a dotal portion), and afterwards imported into the civil law, and from thence adopted into the language or the common law (*h*), in which it includes all the personal apparel and ornaments of the wife, which she possesses, and which are suitable to her rank and condition in life (*i*). The husband in his lifetime may dispose of her paraphernalia, excepting, indeed, her necessary apparel; and they are liable to the claims of creditors, with the like exception (*k*). But the wife is entitled to her paraphernalia against his representatives; for the husband cannot by will dispose of them, or leave them to his representatives (*l*). The court fully recognise this right of the husband and his creditors; although in case of the latter, if there are any other assets of the husband, they will, after his death, be marshalled against his representatives in favour of the widow (*m*).

§ 1377. There is, however, a distinction upon this subject of paraphernalia, which is entitled to consideration. Where the husband, either before or after marriage, gives to his wife articles of paraphernal nature, they are not treated as absolute gifts to her, as her own separate property; for, if they were, she might dispose of them at any time, and he could not appropriate them to his own use. But they are deemed as, technically, paraphernalia to be worn by the wife as ornaments of her person; and so to be deemed gifts *sub modo* only (*n*).

(*g*) *Howard v. Earl of Digby*, 2 Cl. & F. 634; s.c. 8 Bligh N. S. 224; *post*, § § 1396, 1425.

(*h*) Si res dentur in ea, quæ Græci *παρὰφερνα* dicunt, quæ Galli *peculium* appellant. Dig. Lib. 23, tit. 3, f. 9, § 3. As to these the Code declared: "Ut vir in his rebus, quas extra dotem mulier habet, quas Græci *παρὰφερνα* dicunt, nullam uxore prohibente habeat communionem, nec aliquam ei necessitatem imponat, &c. Nullo modo (ut dictum est) muliere prohibente, virum in paraphernis se volumus immiscere." Cod. Lib. 5, tit. 14, l. 8.

(*i*) 2 Black. Comm. 435.

(*k*) 2 Black. Comm. 435, 436. *Lord Townshend v. Windham*, 2 Ves. 1.

(*l*) *Tipping v. Tipping*, 1 P. Will. 729; *Seymore v. Tresilian*, 3 Atk. 358.

(*m*) *Ante*, § 568; *Tipping v. Tipping*, 1 P. Will. 729; *Tynt v. Tynt*, 2 P. Will. 542, 544, and Mr. Cox's note (1); *Probert v. Clifford*, Ambler 6, and Mr. Blunt's note.

(*n*) *Ridout v. Earl of Plymouth*, 2 Atk. 104.

But, if the like articles were bestowed upon her by a father, or by a relative, or even by a stranger, before or after marriage, they would be deemed absolute gifts to her separate use; and then, if received with the consent of her husband, he could not, nor could his creditors, dispose of them any more than they could of any other property received and held to her separate use (o).

§ 1378. In the next place, as to the manner in which a married woman might acquire a separate estate, and as to her powers and interests therein. It is well known that the strict rules of the old common law would not permit the wife to take or enjoy any real or personal estate separate from or independent of her husband. On the other hand, courts of equity, for a great length of time, admitted the doctrine, that a married woman is capable of taking real and personal estate to her own separate and exclusive use; and that she has also an incidental power to dispose of it.

§ 1379. The power to hold real and personal property to her own separate and personal use, might be, and often was, reserved to her by marriage articles, or by an actual settlement made before marriage; and, in that case, the agreement became completely obligatory between the parties after marriage, and regulated their future rights, interests, and duties. In like manner, real and personal property might be secured for the separate and exclusive use of a married woman after marriage; and thus the arrangement might acquire a complete obligation between the parties.

§ 1380. It was formerly supposed that it was necessary, that the property, of which the wife was to have the separate and exclusive use, should be vested in trustees for her benefit; or that the agreement of the husband should be made with persons capable of contracting with him as trustees for her benefit. But, although this course was and is always pursued in formal settlements, yet it has been established for more than two centuries, in courts of equity, that the intervention of trustees is not indispensable; and that, whenever real or personal property was given or devised, or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties should be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also. In all such cases, the husband was held a mere trustee for her (p); or restrained by injunction from interfering with the property (q).

§ 1381. The reports contain a number of cases dealing with the construction of instruments in which conveyancers, instead of simply

(o) *Graham v. Londonderry*, 3 Atk. 393.

(p) *Rich v. Cockell*, 9 Ves. 369.

(q) *Green v. Green*, 5 Hare, 400 n; *Wood v. Wood*, 19 W. R. 1049.

employing the words "separate use" had misdirected their energies in framing what they deemed to be equivalents, often to the disappointment of those who had employed them. There seems little use in retaining cases of construction in an elementary treatise, the more so as the difficulty is disposed of by the Married Women's Property Act, 1882.

§ 1384. In fact as well as in law a separate use is only compatible with an existing marriage. It was formerly doubted if a gift to the use of an unmarried woman could effectively be made, but it was finally settled that although in abeyance it sprung into existence on each marriage (r), unless limited to a particular coverture (s).

§ 1385. Cases also occurred in certain ancient cities of a separate estate, and even of a separate liability of a wife, of a more enlarged nature. But as it was a law of local (t), and not of general, application it is unnecessary to consider its incidents. Since the Married Women's Property Act, 1882, a wife may carry on a separate trade from her husband, with the ordinary risks attaching to such trading, one of which is liability to be made a bankrupt (s. 1, sub-ss. 1, 2, and 5).

§ 1386. Where the agreement for a separate trade by the wife occurred after marriage, and it was founded upon a valuable consideration, the like protection was given at law, if the property were vested in trustees; and the property, and the income and profits thereof, was held secure for the wife against the husband and his creditors. *A fortiori*, the doctrine was enforced in equity. But if it were a voluntary agreement, it would be good against the husband only, and not against his creditors. Care, however, had to be taken in all these cases, that the negotiations were not carried on in the name of the wife, as by taking notes or other securities in her name; for then they would, at law, have been held to belong to the husband, although in equity it was otherwise.

§ 1387. We here perceive that the law would give effect to such agreements, only when those forms had been observed which would vest the property in parties capable of enforcing the proper rights of the wife in legal tribunals; as was the case where the property was vested in trustees for her sole use and benefit, in order to enable her to carry on trade. But courts of equity went further; and if there were any such agreement before marriage, resting in articles and without trustees, by which she was permitted to carry on business on her sole and separate account; or if, without any such ante-nuptial agreement, the husband should have permitted her, after marriage, to carry on business on her sole and separate account; all that she earned

(r) *Tullett v. Armstrong*, 4 Myl. & Cr. 377.

(s) *Stogdon v. Lee*, [1891] 1 Q. B. 661.

(t) See *Tyson v. Smith*, 9 A. & E. 406.

in trade was deemed to be her separate property, and disposable by her as such, subject, however, to the claims of third persons properly affecting it. In the former case, the earnings would be, in equity, protected for her separate use against her husband and his creditors; in the latter, against him only, unless the permission after marriage arose from a valuable consideration. So, if a husband should have deserted his wife, and she should have been enabled, by the aid of her friends, to carry on a separate trade (as that of a milliner), her earnings in such trade were enforced in equity against the claims of her husband.

§ 1388. It remains to say a few words on the subject of the wife's power to dispose of her separate property, and of its liability for her contracts and debts. Wherever a trust was created, or a power was reserved by a settlement, to enable the wife after marriage to dispose of her separate property, either real or personal, it might be executed by her in the very manner provided for, whether it were by deed or other writing, or by a will or appointment. And courts of equity would, in all cases, enforce against heirs, devisees, and trustees, as well as against the husband and his representatives, the rights of the donee or appointee of the wife. But, where no such settlement, trust, or power was created before marriage, but it rested in a mere agreement between the husband and wife, it was formerly a matter of doubt, whether the wife could dispose of her separate real estate, so as effectually to bind it; although it was admitted that she had a full power to dispose of her personal estate.

§ 1389. The distinction, and the reasons for it, are very clearly stated by Lord Hardwicke (*u*).

§ 1390. But this doubt, however powerfully urged upon technical principles, was overcome; and the doctrine was firmly established by the highest authority, that, in such a case, courts of equity would compel the heir of the wife to make a conveyance to the party in whose favour she had made a disposition of the real estate; in other words, he was treated as a trustee of the donee, or appointee of the wife. So, that it may now be laid down as a general rule, that all ante-nuptial agreements for securing to a wife separate property, would, unless the contrary is stipulated or implied, give her in equity the full power of disposing of the same, whether real or personal, by any suitable act or instrument in her lifetime, or by her last will, in the same manner, and to the same extent, as if she were a *feme sole* (*x*). And in all cases where a power for this purpose was reserved to her by means of a trust, which is created for the purpose, she

(*u*) *Peacock v. Monk*, 2 Ves. Sen. 191.

(*x*) *Wright v. Cadogan*, 6 Bro. Parl. C. 156; s.c. *Ambler*, 468; *Hulme v. Tenant*, 1 Bro. C. C. 20; *Taylor v. Meads*, 4 De G. J. & S. 597.

might execute the power without joining her trustees, unless it was made necessary by the instrument of trust (*y*).

§ 1391. In regard to the power of the wife to dispose of her separate property, where no trust was interposed, but it rested merely upon a post-nuptial agreement of the husband, there was a material distinction, whether it were personal estate, or whether it were real estate. In the former case, her power to dispose of it could affect her husband's right only; and therefore his assent was conclusive upon him. But it was very different in respect to her real estate; for, here her own heirs were or might have been deeply affected in their interests by descent. Now, by the general principles of the common law, a married woman was, during her coverture, disabled from entering into any contract respecting her real property, either to bind herself or to bind her heirs. And this disability could be overcome only by adopting the precise means allowed by law to dispose of her real estate. It is true that the husband, by his own post-nuptial agreement with his wife, might have bound his own interest to her real estate, and have converted himself into a trustee for her (*z*). But he could not trench upon the rights of her heir, who was no party to such an agreement. And, under such circumstances, the latter would take her real estate by descent, unaffected by any of the trusts springing from the agreement.

§ 1392. The remarks which have been made, applied to the case of the real estate of the wife, already vested in her, as affected by her own ante-nuptial or post-nuptial agreement with her husband. But the question might have arisen, as to her rights and power over real estate, which was given by a third person to her, during her coverture, for her separate use, with a power to dispose of the same, where no trustees were interposed to protect the exercise of the power. As to this, the received doctrine seems to have been, that if an estate were, during coverture, given to a married woman and her heirs for her separate use, without more, she had the same power of disposition over it, whether by deed or will, as if she were a *feme sole* (*a*).

§ 1393. As to personal property, and the income of real property, we have already seen, that, if they were given for the separate use of a married woman, she had, in equity, a full power to dispose of them at her pleasure (*b*). But, qualifications might have been attached to the gift, which could control this absolute power; and, on the other hand, this absolute power might have existed, notwithstanding words might have accompanied the gift which might have seemed, *primâ facie*, intended to confer the power *sub modo*, only. Thus, for ex-

(*y*) *Grigby v. Cox*, 1 Ves. Sen. 517; *Essex v. Atkins*, 14 Ves. 547.

(*z*) *Major v. Lansley*, 2 Russ. & M. 355.

(*a*) *Taylor v. Meads*, 4 De G. J. & S. 597.

(*b*) *Hulme v. Tenant*, 1 Bro. C. C. 20; *Major v. Lansley*, 2 Russ. 355.

ample, if there were an express limitation to a married woman *for life*, with a power to dispose of the same property by will; there, her interest would be deemed a partial interest, and equivalent to a life-estate only; and she could not dispose of the property absolutely, except in the manner prescribed by the power (c).

§ 1394. On the other hand, where personal property was expressly given to a married woman, “to her for her sole and separate use,” without saying, *for life*; and she was further authorized to dispose of the same by will; the gift was construed to confer on her the absolute property, and, consequently, as conferring a power to dispose of it otherwise than by will; for, the absolute property being given, the power became nugatory, and was construed to be nothing more than an anxious expression of the donor, that she might have an uncontrolled power of disposing of the property (d).

§ 1395. A married woman having this general power of disposing of her separate property, the question naturally arose, whether she might bestow it by appointment, or otherwise, upon her husband; or whether the legal disability attached to such a transaction. Upon this subject the doctrine was firmly established in equity, that she might bestow her separate property, by appointment or otherwise, upon her husband, as well as upon a stranger. But, at the same time, courts of equity examined every such transaction between husband and wife with an anxious watchfulness, and caution, and dread of undue influence; and if they were required to give sanction or effect to it, they would examine the wife in court, and adopt other precautions to ascertain her unbiassed will and wishes (e).

§ 1396. Courts of equity would not only sanction such a disposition of the wife's separate property in favour of her husband, when already made, but they would also in proper cases, upon her application and consent, given in court, decree such property to be passed to her husband, whether it were in possession or reversion, in such a manner as she should prescribe. In the same way, her separate estate might be charged with and made liable for his debts. But courts of equity had no authority, even with the consent of the wife, to transfer to the husband any property, secured to her sole and separate use for life, where no power of disposition was reserved to her over the property, or beyond the power reserved to her (f). And, therefore, if the husband should receive such property, he would ordinarily be compelled to account therefor. The same rule was applied where the husband had by a settlement contracted to allow a

(c) Sugden, Powers, chap. v., sect. 1.

(d) *Elton v. Shephard*, 1 Bro. C. C. 532, and Mr. Belt's note. And see *Richards v. Chambers*, 10 Ves. 584.

(e) *Dynock v. Atkinson*, 3 Bro. C. C. 195; *Murray v. Lord Elbank*, 10 Ves. 89; *Osborn v. Morgan*, 9 Hare, 432.

(f) *Richards v. Chambers*, 10 Ves. 580.

specific annual sum (not pin-money) for her sole and separate use, as, for example, £100 or £1,000 a year; for, in such cases, if he did not pay it, he would be held liable for the arrears (*g*). Where, indeed, the husband, with the consent of his wife, is in the habit of receiving the income, profits, and dividends of her separate estate, courts of equity regard the transaction as showing her voluntary choice, thus to dispose of it for the use and benefit of the family, and an absolute gift (*h*).

§ 1397. In the next place, let us examine how far the separate property of the married woman was liable for any contracts, debts, or other charges created by her during her coverture. At law, she was, during her coverture, generally incapable of entering into any valid contract to bind either her person or her estate (*i*). In equity, also, it was clearly established that she could not by contract bind her person or her property generally. The only remedy allowed was against her separate property (*k*). The reason of this distinction between her separate property and her other property is that, as to the former, she was treated as a *feme sole*, having the general power of disposing of it; but, as to the latter, all the legal disabilities of a *feme covert* attached upon her (*l*).

§ 1398. The doctrines maintained by courts of equity, as to the nature and extent of the liability of the separate estate of a married woman for her debts and other charges created during her coverture were, after great discussion and variation of judicial opinion, finally settled as follows, that a married woman, having separate estate, would be liable so far as that separate estate extended, not only in so far as related to all the debts, charges, incumbrances, and other engagements which she expressly, or by implication, charged on that separate estate, but also to all her general engagements, in whatever way these engagements were created, and whether in making them her separate estate was referred to or not (*m*).

§ 1402. In the next place, let us proceed to the consideration of what was commonly called the equity of a wife to a settlement out of her own property. It is well known, that, at the common law, marriage amounted to an absolute gift to the husband of all the goods, personal chattels, and other personal estate of which the wife was actually or beneficially possessed at that time, in her own right, and of such other goods, personal chattels, and personal estate as came to her during the marriage. But to her *choses in action*, such as debts

(*g*) *Howard v. Digby*, 8 Bligh N. S. 224, 257, 258.

(*h*) *Squire v. Dean*, 4 Bro. C. C. 326; *Caton v. Ridout*, 1 Mac. & G. 599; *In re Flammank*, *Wood v. Cock*, 40 Ch. D. 461.

(*i*) *Marshall v. Rutton*, 8 T. R. 545.

(*k*) *Hulme v. Tenant*, 1 Bro. C. C. 16, and Mr. Belt's note (3).

(*l*) See *Stuart v. Lord Kirkwall*, 3 Mad. 387; *Owens v. Dickenson*, 1 Cr. & Phil. 48.

(*m*) *Hulme v. Tenant*, 1 Bro. C. C. 16; *Johnson v. Gallagher*, 3 De G. F. & J. 404; *The London Chartered Bank of Australia v. Lemprière*, L. R. 6 P. C. 572.

due by obligation, or by contract, or otherwise, the husband was not absolutely entitled, unless they were reduced into possession during her life. In regard to chattels real, of which the wife was or might be possessed during the coverture, the husband had a qualified title. He had an interest therein in her right; and he might, by his alienation during the coverture, absolutely deprive her of her right therein. But if he did not aliene them she was entitled to them, if she survived him; and, if he survived her, he was entitled to them in virtue of his marital rights.

§ 1403. These general explanations of the state of the common law, as to the respective rights of husband and wife in regard to her personal property, are sufficient to enable us to understand the origin, nature, and character of the wife's equity to a settlement. We have already seen the protective power which courts of equity exerted to preserve the control and disposition of married women over property secured or given to their separate use, and also to preserve the rights and interests of wards of the court. Whenever the husband reduced the personal estate of his wife, of whatever original nature it might be, whether legal or equitable, into possession, he became thereby the absolute owner of it, and might dispose of it at his pleasure. And this being the just exercise of his legal marital rights, courts of equity would not interfere to restrain or limit it. Wherever, also, he was pursuing the common remedies at law, for the purpose of reducing such personal property into possession, courts of equity for the same reason were, or at least (it is said) ought to have been, ordinarily passive.

§ 1404. The principal if not the sole cases in which courts of equity interposed to secure to the wife her equity to a settlement were, first, where the husband sought aid or relief in a court of equity in regard to her property; secondly, where he made an assignment of her equitable interests; thirdly, where she sought the like relief, as plaintiff, against her husband, or his assignees, in regard to her equitable interests. In the first case, the court laid hold of the occasion, upon the ground of the maxim that he who seeks equity must do equity, to require the husband to make a suitable settlement upon the wife (if not already made) out of that property or some other property, for her due maintenance and support, in case of her survivorship, according to the rank, and condition, and circumstances of the parties (*n*). In the second case, the same principle was applied to other persons, claiming under the husband, as to himself. In the third case, the doctrine might seem more artificial. But it was, in truth, enforcing against the husband her admitted equity to prevent an irreparable injustice (*o*).

(*n*) *Osborn v. Morgan*, 9 Hare, 432.

(*o*) *Lady Elibank v. Montolieu*, 5 Ves. 737.

§ 1405. The general theory of this branch of equity jurisprudence may be thus succinctly stated. By marriage at common law the husband clearly acquired an absolute property in all the personal estate of his wife, capable of immediate and tangible possession. But if it were such as could not be reduced into possession, except by an action at law, or by a suit in equity, he had only a qualified interest therein, such as would enable him to make it an absolute interest by reducing it into possession. If it were a *chose in action*, properly so called, that is, a right, which might be asserted by an action at law, he would be entitled to it, if he had actually reduced it into possession (for a judgment was not sufficient) in his lifetime. But if it were a right, which must have been asserted by a suit in equity, as where it was vested in trustees who had the legal property, he had still less interest. He could not reach it without application to a court of equity, in which he could not sue without joining her with him; although perhaps a court of law might have permitted him to do so, or at least to use her name without her consent. If the aid of a court of equity were asked by him in such a case, it would make him provide for her, unless she consented to give such equitable property to him (*p*).

§ 1406. It was called the wife's equity, because she could waive it; but where the wife insisted upon it, and a settlement had been decreed, it was the invariable practice to include a provision for the issue of the marriage, through the instrumentality of the equity of the wife (*q*). This equity would not only be administered at the instance of the wife and her trustees, but also where the husband sued in equity for her property, at the instance of her debtor (*r*). We shall presently see in what manner the wife might waive the right to such a settlement, and what would be the effects of her waiver (*s*), and what other circumstances would deprive her and her issue of the right (*t*).

§ 1407. It is not easy to ascertain the precise origin of this right of the wife, or the precise grounds upon which it was first established. It has been said that it was an equity, grounded upon natural justice; that it was that kind of parental care which a court of equity exercises for the benefit of orphans, and that as a father would not have married his daughter without insisting upon some provision, so a court of equity, which stands *in loco parentis*, would insist on it (*u*). This is not so much a statement of the origin as it is of the effect and value of the jurisdiction. The truth seems to be, that its origin cannot be traced to any distinct source. It was a creature of a court of equity.

(*p*) *Dymock v. Atkinson*, 3 Bro. C. C. 195; *Murray v. Lord Elbank*, 10 Ves. 84; *Osborn v. Morgan*, 9 Hare, 432.

(*q*) *Murray v. Lord Elbank*, 13 Ves. 1; *Lloyd v. Mason*, 5 Hare, 149; *Wallace v. Auldjo*, 3 De G. J. & S. 643.

(*r*) *Davy v. Pollard*, Finch Ch. 377; s.c. 1 Eq. Abr. 64, pl. 2.

(*s*) *Dymock v. Atkinson*, 3 Bro. C. C. 195; *In re Walker*, Ll. & G. t. Sugd. 299.

(*t*) See *post*, § 1416.

(*u*) *Jewson v. Moulson*, 2 Atk. 419.

and stood upon its own peculiar doctrine and practice. It is in vain to attempt, by general reasoning, to ascertain the nature or extent of doctrine, and therefore we must look entirely to the former practice of the court for its proper foundation and extent (*x*).

§ 1408. And, in the first place, a settlement would be decreed at the instance of the wife whenever the husband sought the aid or relief of a court of equity to procure the possession of any portion of his wife's fortune (*y*). In such a case, it was of no consequence whether the fortune accrued before or during the marriage; whether the property consisted of funds in the possession of trustees, or of third persons; or whether it were in the possession of the court or under its administration, or not; for, under all these circumstances, the equity of the wife would equally attach to it. This equity of the wife was for a long time supposed to be confined to the absolute personal property of the wife. It was afterwards extended to the rents and profits of the real estate, in which she had a life-interest, although it was not then generally extended, as against the husband personally, to equitable interests, in which she had a life-estate only. Afterwards it acquired a wider range, and was applied to all cases of the real estate of the wife, whether legal or equitable, where the husband or his assignee was obliged to come into a court of equity to enforce his rights against the property (*z*).

§ 1409. There were some exceptions to the general doctrine, however, which deserve notice. In the first place, if both the husband and wife were subjects of, and residents in, a foreign country, where he would be entitled to his wife's fortune without making any settlement upon her, in such a case, courts of equity, sitting in another jurisdiction, would, as to personal property of the wife within their jurisdiction, follow the local law, and do what the local tribunals would ordain under similar circumstances; for the rights of the husband and wife are properly subject to the local law of their own sovereign (*a*).

§ 1410. Another exception was, where the wife's property was a leasehold estate, or a term for years, held in trust for her. In such a case, it has been said, that the husband might assign the term for a valuable consideration, and thereby dispose of it, without the wife having any claim against his assignee; and if he did not dispose of it, there was some doubt whether the wife had any equity against him (*b*). It is extremely difficult to perceive the exact grounds upon which this exception rested. It constituted a seeming anomaly, resting more upon authority than principle; and, as such, it has been several times

(*x*) *Murray v. Lord Elibank*, 10 Ves. 90; s.c. 13 Ves. 6.

(*y*) *Osborn v. Morgan*, 9 Hare, 432.

(*z*) *Sturgis v. Champneys*, 5 Myl. & Cr. 97, 105 to 107; *Hanson v. Keating*, 4 Hare, 1; *Taunton v. Morris*, 11 Ch. D. 779.

(*a*) *Campbell v. French*, 3 Ves. 321.

(*b*) *Turner's Case*, 1 Vern. 7.

doubted, and perhaps ought now to be deemed overruled (c). But, however questionable it may be in its origin, and however it may seem to be at variance with the received doctrine, in other analogous cases of assignment by the husband, it has had no inconsiderable weight of judicial authority in its favour. It has even been carried to this extent, that the husband might by his assignment of the reversionary interest in a term of years, held in trust for the wife, bind that interest, so as to deprive her of her equity therein; although he could not, in the same way, dispose of her reversionary interest in any *choses in action* or personal chattels (d). The sole ground of the doctrine seems to have been, that the husband might dispose of his wife's contingent reversionary legal interest in a term of years, and that there is no difference in equity, between the legal interests in, and the trusts of a term for years. But when the interest of the wife could not vest in possession until after the death of the husband, as the husband could not claim by survivorship, his assignee's title was postponed to that of the wife (e).

§ 1411. Secondly. In regard to the wife's equity to a settlement, in cases where the husband made an assignment of her *choses in action*, or other equitable interests. It was long settled, that the assignees in bankruptcy or insolvency of the husband, and also his assignees for the payment of debts, due to his creditors generally, were bound to make a settlement upon the wife out of her *choses in action* and equitable interests assigned to them, whether they were absolute interests or life-interests only in her, in the same way, and to the same extent, and under the same circumstances, as he would be bound to make one; for it is a general principle, that such assignees take the property, subject to all the equities which affect the bankrupt, or insolvent, or general assignor. Such assignees also took the property, subject to the wife's right of survivorship, in case the husband dies before the assignees reduced her *choses in action* and equitable interests into possession (f).

§ 1412. The principal controversy which formerly arose was, whether a special assignee or purchaser from the husband, for a valuable consideration, of her *choses in action*, or equitable interests, took the property subject to the same liability as the husband to make a settlement upon the wife and children, and it was held that he was so bound if the wife was entitled to the corpus of the *chose in action* or property, but not if she was entitled to the income (g).

(c) See Mr. Raithby's note to *Turner's Case*, 1 Vern. 7; *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Hanson v. Keating*, 4 Hare, 1; *In re Carr's Trusts*, 12 Eq. 609.

(d) *Donne v. Hart*, 2 Russ. & Myl. 360; *Honner v. Morton*, 3 Russ. 65; *Purdew v. Jackson*, 1 Russ. 1.

(e) *Duberly v. Day*, 16 Beav. 33.

(f) *Pierce v. Thornley*, 2 Sim. 167.

(g) *Tidd v. Lister*, 3 De G. M. & G. 857; *Duncombe v. Greenacre*, 2 De G. F. & J. 509; s.c. at the hearing 29 Beav. 578; *In re Duffy's Trust*, 28 Beav. 386.

§ 1413. In respect to reversionary *choses in action*, and other reversionary equitable interests of the wife, in personal chattels (although not, as we have seen, to her immediate and present equitable interests (*h*), in chattels real), the doctrine was formerly well settled, and in a manner most favourable to her rights; for no assignment by the husband, with her consent, even when she joined in the assignment, would exclude her right of survivorship in such cases (*i*). This was altered by 20 & 21 Vict. c. 57, which entitled her with the concurrence of the husband to alienate her reversionary interests in personalty by a deed acknowledged before Commissioners as in the Act provided.

§ 1414. Thirdly. The equity of a wife to a settlement was not only enforced, in regard to her *choses in action* and equitable interests under the circumstances above mentioned, against the husband and his assignees, where he or they were plaintiffs, seeking aid and relief in equity; but it was also enforced where she or her trustee brought a suit in equity for the purpose of asserting it (*k*).

§ 1415. We have seen, that, when the husband came into a court of equity for relief, as to any property, which he claimed in her right *jure mariti*, he would be obliged to submit to the terms of the court, and make a settlement or provision for her, otherwise the court would not render him any assistance. If he did not choose to make any such settlement or provision, the court would not, ordinarily, take from him the income and interest of his wife's fortune, so long as he was willing to live with her, and maintain her, and there was no reason for their living apart (*l*).

§ 1416. Let us pass, in the next place, to the consideration of the circumstances under which this equity to a settlement might be waived or lost. And here, it need scarcely be said, that, if the wife were already amply provided for, under a prior settlement, the very motive and ground for the interference of a court of equity in her favour was removed. But she would not, ordinarily, be barred by an inadequate settlement, unless it were by an express contract made before marriage (*m*).

§ 1417. The wife's equity for a settlement was generally understood to be strictly personal to her, and it did not extend to her issue, unless it had been asserted in judicial proceedings by her in her lifetime. If, therefore, she had died, entitled to any equitable interest, and left her husband, and her children were unprovided for by any settlement, still, her husband would be enabled to file a bill to recover the same, without making any provision for the children (*n*). In

(*h*) *Ante*, § 1410.

(*i*) *Purdew v. Jackson*, 1 Russ. 1.

(*k*) *Sturgis v. Champneys*, 5 Myl. & Cr. 97.

(*l*) *Eedes v. Eedes*, 11 Sim. 569.

(*m*) *Giacometti v. Prodggers*, L. R. 8 Ch. App. 338.

(*n*) *Murray v. Lord Elbank*, 13 Ves. 1; *Lloyd v. Mason*, 5 Hare, 149; *Wallace v. Auldjo*, 3 De G. J. & S. 643.

truth, the equity of the children was not an equity to which in their own right they were entitled. It could not, therefore, be asserted against the wishes of the wife, or in opposition to her rights. The court, in making a settlement of the wife's property, always attended to the interests of the children, because it was supposed that, in so doing it was carrying into effect her own desires to provide for her offspring. But, if she dissented, the court withheld all rights from the children (*o*).

§ 1418. It was competent, however, for the wife at any time pending the proceedings, and before a settlement under the decree was completed, or at least before proposals were made under that decree, by her consent, given in open court or under a commission, to waive a settlement, and to agree that the equitable fund should be wholly and absolutely paid over to her husband (*p*). In such an event, both she and her children would be deprived of all right whatsoever in and over the fund. But a female ward of the Court of Chancery, who had been married without its authority, and in contempt of it, would not be allowed by the court to dispense with a settlement out of her property. On the contrary, the court could insist upon such a settlement being made by the husband notwithstanding her consent to the contrary. And the court would often, by way of punishment, in gross cases, do what it was not accustomed to do on common occasions, require a settlement of the whole of the wife's property to be made on her and her children (*q*).

§ 1419. The equity of the wife to a settlement might not only be waived by her, but it might also be lost or suspended by her own misconduct (*r*). Thus, if the wife were living in adultery, apart from her husband, a court of equity would not interfere, upon her own application, to direct a settlement out of her *choses in action*, or other equitable interests; for, by such misconduct, she had rendered herself unworthy of the protection and favour of the court (*s*). On the other hand, a court of equity would not, in such a case, upon the application of the husband, decree such equitable property of the wife to be paid over to him; for he was at no charge for her maintenance; and it was only in respect to his duty to maintain her, that the law gave him her fortune (*t*).

§ 1419*a*. Where, indeed, the wife had entitled herself to a settlement, and it had been decreed by a court of equity, there, the court would not withhold or vary her right in consequence of any misconduct

(*o*) *In re Walker*, L. l. & G. t. Sugd. 324.

(*p*) *Murray v. Lord Elbank*, 10 Ves. 84.

(*q*) *Like v. Beresford*, 3 Ves. 506; *Stackpole v. Beaumont*, 3 Ves. 89, 98.

(*r*) Where the wife had been guilty of fraud in inducing a person to lend money on the security of the property, she could not claim a settlement out of it as against such creditor. *In re Lush's Trusts*, L. R. 4 Ch. 591.

(*s*) *Carr v. Eastbrooke*, 4 Ves. 146.

(*t*) *Sidney v. Sidney*, 3 P. Will. 269.

on her part, even although the decree had not been carried into execution. Nor would the court in such a case, at the instance of the husband who had misconducted himself, entertain a suit for a settlement against the wife or her children, and thereby relieve him from his ordinary duty of maintaining them (*u*).

§ 1420. But we must be careful to distinguish between an application made for a settlement on the wife, which was addressed to the equity of the court, and which was administered by it, *sud sponte*, upon the merits of the parties, and was not founded in any antecedent vested rights, and other applications, where the parties stood upon their own positive vested rights under a settlement, or under a valid contract for a settlement, made before marriage. In the latter cases, courts of equity could not refuse to protect or support those vested rights on account of any misconduct in the wife; and it would be no answer to a suit, brought by her for a settlement in such cases, that she had been guilty of adultery (*x*).

§ 1421. In this and succeeding sections the learned author discussed a jurisdiction, alleged to exist, exercised by the Court of Chancery to decree a separate maintenance in the nature of alimony to the wife by the husband out of his own property. The only reported case in which this was done occurred during the Commonwealth (*y*), when the jurisdiction of the ecclesiastical courts had been transferred by statute to the Court of Chancery. In all the other reported cases (*z*) the husband had received property from the wife's side, and where the provision may be regarded as in the nature of an equity to a settlement, and the only doubt that can be raised is whether the value of the property received measured the extent of the husband's liability (*a*), although it probably did (*b*). In a case before Lord Hardwicke (*c*) there was the additional circumstance that the wife had sued out a *supplicavit* in Chancery, and as the husband had forfeited his recognizance (*d*), it may have been a remedy in the nature of a *quantum damnificata*. The only cases in which it was ordered were where the husband deserted his wife or turned her out of doors without sufficient means of support, or compelled her by ill-treatment or cruelty to take refuge with relations or friends. It was put an end to by an offer to resume cohabitation and to treat her *bene et honeste*.

§ 1424. But, although courts of equity did not assert any general jurisdiction to decree a suitable maintenance for the wife out of her

(*u*) *Hodgens v. Hodgens*, 11 Bligh N. S. 62, pp. 104 to 110.

(*x*) *Seagrave v. Seagrave*, 13 Ves. 439; *Buchanan v. Buchanan*, 1 Ball & B. 203.

(*y*) *Whorewood v. Whorewood*, 1 Ch. Cas. 250.

(*z*) *Wright v. Morley*, 11 Ves. 12, where the earlier cases are referred to; *Duncan v. Duncan*, 19 Ves. 394.

(*a*) *Lambert v. Lambert*, 2 Bro. P. C. 18.

(*b*) *Gilchrist v. Cator*, 1 De G. & Sm. 188.

(*c*) *Head v. Head*, 3 Atk. 295, 547.

(*d*) *Colmer v. Colmer*, Moseley, 113, 118.

husband's property, because he had deserted her or ill-treated her, yet, on the other hand, they did not abstain altogether from interference in her favour. Whenever the wife had any equitable property, within the reach of the jurisdiction of courts of equity, they would lay hold of it; and, in the case of the desertion or ill-treatment of the wife by the husband, as well as in the case of his inability or refusal to maintain her, they would decree her a suitable maintenance out of such equitable funds (*e*). The general ground on which this jurisdiction was asserted was, that the law, when it gave the property of the wife to the husband, imposed upon him the corresponding obligation of maintaining her; and that obligation would fasten itself upon such equitable property, in the nature of a lien or trust, which courts of equity, when necessary, would, in pursuance of their duty, enforce. If the equitable property had been fraudulently transferred into the possession of the husband, or of a third person for his use, the same equity would be enforced against it in their hands; and if it had passed into the possession of a *bonâ fide* purchaser without notice, the other property of the husband would be held liable as a substitute (*f*).

§ 1425. Courts of equity would also, for the like reasons, interfere, and decree maintenance to the wife, under the like circumstances, whenever there was a positive agreement between the parties for the purpose, by way of specific performance (*g*). But no action could be maintained in equity to enforce any decree for alimony in a matrimonial cause because it may be recalled or the amount payable varied (*h*).

§ 1426. This equity of a wife to a maintenance, out of her own equitable estate, was generally confined to cases of the nature above mentioned, that is to say, where the husband abandoned or deserted her; or where he refused to maintain her; or where, by reason of his insolvency, he was incapable of affording a suitable maintenance for her. Unless some one of these ingredients existed, courts of equity would decline to interfere. If, therefore, the separation of the wife from her husband were voluntary on her part, and was caused by no cruelty or ill-treatment; or if he were *bonâ fide* ready and willing and able to maintain her, and she, without good cause, chose to remain separate from him; or if she already had a competent maintenance; in all such cases, courts of equity would afford her no aid whatever in accomplishing a purpose, which was deemed subversive of the true policy of the matrimonial law, and destructive of the best interests of society (*i*). *A fortiori*, where the wife had eloped,

(*e*) *Wright v. Morley*, 11 Ves. 12; *Taunton v. Morris*, 11 Ch. D. 779; *Boxall v. Boxall*, 27 Ch. D. 220.

(*f*) *Colmer v. Colmer*, Mos. 113; *Watkins v. Watkins*, 2 Atk. 96.

(*g*) *Angier v. Angier*, Prec. Ch. 496; *Head v. Head*, 3 Atk. 295, 547.

(*h*) *Stones v. Cooke*, 8 Sim. 321. See *In re Robinson*, 27 Ch. D. 160.

(*i*) *Watkins v. Watkins*, 2 Atk. 96; *Ball v. Montgomery*, 2 Ves. Jun. 191, 198,

and was living in a state of adultery, they would withhold all countenance to such grossly immoral conduct; and they would leave the wife to bear, as she might, the ordinary results of her own infamous abandonment of duty (k).

§ 1427. It was formerly considered that courts of equity would, under no circumstances whatever, enforce specific performance of deeds of separation between husband and wife, on the ground that such separation between married persons is against public policy. "But a change came over judicial opinion as to public policy, other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce, by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately, and that was the view carried out by the courts when it became once decided that separation deeds *per se* were not against public policy" (l). A specific performance of such a deed can be enforced by the husband against the wife, and at the instance of the wife against the husband; and if either party threatens to sue for restitution of conjugal rights, the courts of equity have power to issue an injunction against the party so threatening to sue (m).

§ 1428. A deed of separation does not alter the legal condition of the wife. A court of equity has power to enforce specific performance of an agreement for such a deed, and for the compromise of a suit in the Divorce Court without infringing the provisions of the Judicature Act which prohibit interference with proceedings pending in another branch of the court (n).

§ 1429. Such are some of the more important instances of the exercise of jurisdiction by courts of equity in regard to married women, for their protection, support, and relief, in some of which they were merely auxiliary to the common law; and in others, again, they proceeded upon principles wholly independent, if not in contravention, of that system. Upon a just survey of the doctrines of courts of equity upon this subject, it is difficult to resist the impression that their interposition was founded in wisdom, in sound morals, and in a delicate adaptation to the exigencies of a polished and advancing state of society. And here, as well as in the exercise of

199; *Carr v. Eastabrooke*, 4 Ves. 196; *Giacometti v. Prodgers*, L. R. 8 Ch. 338; *Duncan v. Duncan*, 19 Ves. 394.

(k) *Wilkes v. Wilkes*, 2 Dick. 791; *Worrall v. Jacob*, 3 Meriv. 267; *Westmeath v. Westmeath*, Jac. 126; s.c. 1 Dow N. S. 519; *St. John v. St. John*, 11 Ves. 529; *Frampton v. Frampton*, 4 Beav. 287, 293; *Duncan v. Campbell*, 12 Sim. 616.

(l) *Per* Sir G. Jessel, M.R., in *Besant v. Wood*, 12 Ch. D. 605, see p. 620.

(m) *Besant v. Wood*, 12 Ch. D. 605. The change in judicial opinion noted in the text dates from *Wilson v. Wilson*, 1 H. L. C. 538. This section, owing to the change in the law, is altogether different from that in the former editions of the learned author.

(n) *Hart v. Hart*, 18 Ch. D. 670.

the jurisdiction in regard to infants and lunatics, we cannot fail to observe the parental solicitude with which courts of equity administered to the wants, and guarded the interests, and succoured the weakness, of those who were left without any other protectors, in a manner which the common law was too rigid to consider, too indifferent to provide for.

§ 1429a. The learning as to the property of married women, which formerly constituted an important part of the doctrines of courts of equity, has lost all its importance by the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which consolidated and amended earlier enactments of 1870 and 1874, and which has itself been amended by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), and the Married Women's Property Act, 1907 (7 Edw. 7, c. 18). By the effect of section 1, sub-s. (1) of the Act of 1882, all property of a married woman, however acquired, becomes her separate property (o), without the intervention of any trustee. And by sub-section (2) she has become capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract and of suing or being sued in contract or in tort in all respects as if she were a *feme sole*, and her husband need not be joined with her either as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. By section 2 of the Act of 1893, she may, if a plaintiff (p), be ordered to pay the costs of any action or other proceeding out of property which is subject to a restraint upon anticipation, and the order enforced by the appointment of a receiver or the sale of the property. And by section 1 of the Act of 1893, every contract entered into after December 5, 1893, by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to; with an exception from liability of any property which at that time or thereafter she is restrained from anticipating. Every married woman carrying on a trade separately from her husband shall, in

(o) *Ex parte Hood Barrs*, [1896] 2 Ch. 690.

(p) *Hood Barrs v. Cathcart*, [1895] 1 Q. B. 873; *Moran v. Race*, [1896] P. 214; *Hood Barrs v. Heriot*, [1897] A. C. 177.

respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*. By section 2 of the Act of 1882, every woman who marries after 1882, is entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill. By section 3 of the same statute, a wife who lends money to her husband for the purpose of any trade or business carried on by him or otherwise, is postponed to the general trade creditors in the event of bankruptcy (q). By section 4 of the same statute, the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act. And by section 5 of the same statute, every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid (r). Sections 6, 7, 8 govern investments made by married women in the public stocks or funds, or in the shares of private companies. By section 10 of the Act of 1882, if such investments shall have been made by a married woman by means of moneys of her husband without his consent, the dividends may be ordered to be paid to the husband. The same section sets aside any investment made by the husband or wife for fraudulent purposes. By section 11 of the same statute, a married woman may effect a policy on her own life, or on the life of her husband, for her separate use; and a woman may take out a policy of life assurance expressed to be for the benefit of her husband, or her children, or both, and in like manner her husband may take out a policy of assurance expressed to be for the benefit of his wife, or of his children, or both, and thereby, whether trustees be appointed or not, a trust shall be created in favour of the objects therein named, and the moneys payable under such policies shall not form part of the estate of the insured; but if it be shown that the policy was taken out to defraud the creditors, the latter shall

(q) But this does not apply to the case of a married woman lending money to a firm of which her husband is one of several partners. *In re Tuff, Ex parte Nottingham*, 19 Q. B. D. 88.

(r) *Reid v. Reid*, 31 Ch. D. 402; *Smart v. Tranter*, 43 Ch. D. 587; *Stockley v. Parsons*, 45 Ch. D. 51.

be entitled to recover a sum equal to the premiums paid. By section 12 of the Act of 1882, every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid (*s*), no husband or wife shall be entitled to sue the other for a tort. And by section 13, a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise if this Act had not passed. Section 14 of the same statute limits the liability of the husband for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid. By section 17, questions between husband and

(*s*) Notwithstanding this section, a husband is not entitled to maintain an action against his wife for money lent to her, or money paid for her at her request, where the money is lent or paid before the marriage, although he is entitled to maintain an action against his wife and to charge her separate property, for money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage, by force of sect. 1, sub-s. 2. *Butler v. Butler*, 14 Q. B. D. 831.

wife as to property, may be decided in a summary way. By section 18, a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*. By section 19, nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement (t), agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors. This section renders necessary the consideration of a point not adverted to by the author. The Court of Chancery having invented the separate use, permitted a condition to be attached, that it should be inalienable during the existence of the separate use, but apart from that equitable interest a restriction against alienation is as inoperative in a court of equity as it is in a court of law (u). But it is now unnecessary to limit the estate formally to the separate use of a married woman, in order to attach an effective restraint upon alienation (x). The older term was a restraint upon anticipation because its inventor (Lord Thurlow) first attached it to a life interest, and it is still usually so described, but it may be attached as well to an absolute interest as to a life interest, and to real or personal estate (y). It was held that this fetter was irremovable during a coverture, even where the interests of a married woman would be advanced by so doing (z).

(t) *Pelton Brothers v. Harrison*, [1891] 2 Q. B. 422; *Hood Barrs v. Heriot*, [1896] A. C. 174.

(u) *Tullett v. Armstrong*, 1 Beav. 1; s.c. 4 Myl. & Cr. 377; *Stogdon v. Lee*, [1891] 1 Q. B. 661.

(x) *Ex parte Hood Barrs*, [1896] 2 Ch. 690.

(y) *Baggett v. Meux*, 1 Coll. 138; s.c. 1 Ph. 627.

(z) *Robinson v. Wheelwright*, 6 De G. M. & G. 535.

To remedy this state of affairs, the court was empowered by the Conveyancing Act, 1881, section 39, to remove the restraint. The section has been repealed by section 7 of the Conveyancing Act, 1911, and the following enlarged provisions substituted: "Where a married woman is restrained from anticipation or from alienation in respect of any property or any interest in property belonging to her, or is by law unable to dispose of or to bind such property, or her interest therein, including a reversionary interest arising under her marriage settlement, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in such property." It is to be feared that too little attention has been paid in some instances to the qualification that it should be "for her benefit," words which also occurred in the repealed section of the Act of 1881. The fact that the trustees, if any, are not necessary parties to the application (a) may account for this. As already stated, property of a married woman which is subject to a restraint upon anticipation may be made available for the costs of proceedings instituted by her. Here her benefit is obviously out of consideration. The construction, which seems to have been inevitable, placed upon section 19 of the Married Women's Property Act, 1882, enabled the husband to render nugatory the provisions of the statutes (b), but by section 2 of the Act of 1907, her concurrence is required to an alienation of her property by the husband. If she dies an infant, her property is bound in the hands of the husband, who would by reason of her death become entitled to her personalty (c), by his covenant or disposition. The property of a married woman may be made available to satisfy her liabilities in the hands of her personal representative by section 23 of the Act of 1882. A married woman could always be appointed a trustee or executor by act of the parties, although the Court of Chancery would not appoint her a trustee as a matter of policy (d), and section 24 of the Act of 1882 makes her separate property available for her breach of trust or *devastavit* and frees her husband from liability, which he would have been under before the statute, "unless he has acted or intermeddled in the trust or administration."

(a) *In re Little*, 36 Ch. D. 701.

(b) *Hancock v. Hancock*, 38 Ch. D. 78; *Stevens v. Trevor-Garrick*, [1893] 2 Ch. 307.

(c) *Smart v. Tranter*, 43 Ch. D. 587. See *Att.-Gen. v. Partington*, L. R. 4 H. L. 100.

(d) *Lake v. De Lambert*, 4 Ves. 595.

CHAPTER XXXVII.

SET-OFF.

§ 1430. It remains for us to take notice of a few other matters, over which courts of equity exercised a jurisdiction, either in its own nature exclusive, or, at least, exclusive for particular objects, and under particular circumstances. Upon these, however, our commentaries will necessarily be brief, as they either are not of very frequent occurrence, or they are, in a great measure, embraced under the heads which have been already discussed.

§ 1431. And, in the first place, let us consider the subject of SET-OFF, as an original source of equity jurisdiction (*a*). It is not easy to ascertain the true nature and extent of this jurisdiction, since it was materially affected in its practical application by the statutes of 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, in regard to set-off at law, in cases of mutual unconnected debts (*b*); and by the more enlarged operation of the bankrupt laws, in regard to set-off, both at law and in equity, in cases of mutual debts and mutual credits (*c*).

§ 1432. It was said, by a learned chancellor, that before the statute or set-off at law, and the statutes of mutual debts and credits in bankruptcy, "this court (that is, the Court of Chancery as a court of equity) was in possession of it (*i.e.*, the doctrine of set-off), as grounded upon principles of equity, long before the law interfered. It is true, where the court does not find a natural equity, going beyond the statute (of set-off), the construction is the same in equity as at law. But that does not affect the general doctrine upon natural equity. So, as to mutual debts and credits, courts of equity must make the same construction as the law. But, both in law and in equity, that statute, enabling a party to prove the balance of the account, upon mutual credit, has gone much farther than the party could have gone before, either in law or in equity, as to set-off" (*d*). This is not a very instructive account of the doctrine; for it leaves in

(*a*) Set-off was formerly called Stoppage. See *Downham v. Matthews*, Prec. Ch. 582; *Jeffs v. Wood*, 2 P. Will. 128, 129.

(*b*) See Bac. Abr. title *Set-off*, A. B, C. These statutes have been repealed and an enlarged jurisdiction conferred upon the court as hereafter noticed. § 1444*a*, *post*.

(*c*) See stat. 4 & 5 Anne, c. 17; 5 Geo. 1, c. 2; 5 Geo. 2, c. 30; 46 Geo. 3, c. 135; 6 Geo. 4, c. 16.

(*d*) Lord Eldon in *Ex parte Stephens*, 11 Ves. 27; *Ex parte Blagden*, 19 Ves. 467.

utter obscurity what were the particular cases in which courts of equity did interpose upon principles of natural equity (*e*). In later times a very eminent judge, Sir G. Turner, when vice-chancellor, asserted that courts of equity had borrowed the rule from the Roman law (*f*). Sir G. Jessel, M.R., accepted this opinion without comment (*g*). Lord Cranworth, L.C., apparently entertained the same view (*h*).

§ 1433. Lord Mansfield has expressed his views of the subject of set-off in equity in the following language: "Natural equity says, that cross-demands should compensate each other, by deducting the less sum from the greater; and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said, that each must sue and recover separately, in separate actions. It may give light to this case, and the authorities cited, if I trace the law relative to the doing complete justice in the same suit, or turning the defendant round to another suit, which, under various circumstances, may be of no avail. Where the nature of the employment, transaction, or dealings, necessarily constitutes an account, consisting of receipts and payments, debts and credits, it is certain, that only the balance can be the debt; and by the proper forms of proceeding in courts of law or equity, the balance only can be recovered. After a judgment, or decree 'to account,' both parties are equally actors. Where there were mutual debts unconnected, the law said, they should not be set off; but each must sue. And courts of equity followed the same rule, because it was the law; for, had they done otherwise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this in the case of bankrupts; and it was provided for by 4 Anne, c. 17, s. 1, and 5 Geo. 2, c. 30, s. 28. This clause must have, everywhere, the same construction and effect; whether the question arises upon a summary petition, or a formal bill, or an action at law. There can be but one right construction; and, therefore, if courts differ, one must be wrong. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring, that Parliament interposed by 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, s. 5. But the provision does not go to goods, or other specific things wrongfully detained. And, therefore, neither courts of law nor equity can make the plaintiff, who sues for such goods, pay first what is due to

(*e*) The general principles of the English law, as to set-off, are well summed up in Mr. Evans's edition of Pothier on Obligations, vol. 2, p. 112, No. 13.

(*f*) *Freeman v. Lomas*, 9 Hare, 109, 113.

(*g*) *Middleton v. Pollock, Ex parte Nugee*, L. R. 20 Eq. 29, 34. See also *per eundem* *In re Whitehouse & Co.*, 9 Ch. D. 595, 597.

(*h*) *Wallis v. Bastard*, 4 De G. M. & G. 251, 256.

the defendant; except so far as the goods can be construed a pledge; and then the right of the plaintiff is only to redeem" (i).

§ 1434. If this be a true account of the matter, then it would seem that courts of equity did not, antecedently to the statutes of set-off, exercise any jurisdiction as to set-off, unless some peculiar equity intervened, independently of the mere fact of mutual, unconnected accounts. As to connected accounts of debt and credit, it is certain, that both at law and in equity, and without any reference to the statutes, or the tribunal in which the cause was depending, the same general principle prevailed, that the balance of the accounts only was recoverable; which was, therefore, a virtual adjustment and set-off between the parties (k). But there is some reason to doubt, whether Lord Mansfield's statement of the jurisdiction of equity in cases of set-off is to be understood in its general latitude, and without some qualifications. It is true that equity generally followed the law, as to set-off; but it was with limitations and restrictions. If there were no connection between the demands, then the rule was, as it was at law. But, if there were a connection between the demands, equity acted upon it, and allowed a set-off under particular circumstances (l).

§ 1435. In the first place, it would seem, that, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, were accustomed to grant relief in all cases, where, although there were mutual and independent debts, yet there was a mutual credit between the parties, founded, at the time, upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand, a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, or trusting to such debt, as a means of discharging it (m). Thus, for example, if A. should be indebted to B. in the sum of £2,000 by specialty, and B. indebted to A. in the sum of £2,430, the debts being payable at different times, but both presently payable at the time of action brought (n), and of the adjudication (o), a court of law could not set off these independent debts against each other; but a court of equity would not hesitate to do so, upon the ground either of the presumed intention of the parties, or of what is called a natural equity (p). If, in such a case, there should have been an agreement (express or implied) to set off the debts against each other, *pro tanto*,

(i) *Green v. Farmer*, 4 Burr. 2220, 2221.

(k) *Dale v. Sollet*, 4 Burr. 2133.

(l) *Whitaker v. Rush*, Ambler, 407, 408, and Mr. Blunt's note (4); *Rawson v. Samuel*, Cr. & Phil. 161; *Clark v. Cort*, Cr. & Phil. 154; *Middleton v. Pollock*, *Ex parte Knight and Raymond*, L. R. 20 Eq. 515.

(m) *Ex parte Stevens*, 11 Ves. 24; *Vulliamy v. Noble*, 3 Mer. 593.

(n) *Young v. Bank of Bengal*, 1 Moo. P. C. 150; *Richards v. Jones*, 2 Ex. 471.

(o) *Eyton v. Littledale*, 4 Ex. 159.

(p) *Wallis v. Bastard*, 4 De G. M. & G. 251; *Freeman v. Lomas*, 9 Hare, 109.

there could be no doubt that a court of equity would have enforced a specific performance of the agreement, although at the common law, the party might have been remediless. Conversely a right of set-off may be displaced by the agreement of the parties (q).

§ 1436. In the next place, as to equitable debts, or a legal debt on one side, and an equitable debt on the other, there is great reason to believe, that, whenever there was a mutual credit between the parties, touching such debts, a set-off was, upon that ground alone, maintainable in equity; although the mere existence of mutual debts, without such a mutual credit, might not, even in a case of insolvency, have sustained it (r). But a set-off was ordinarily allowed in equity, only when the party, seeking the benefit of it, could show some equitable ground for being protected against his adversary's demand—the mere existence of cross-demands was not sufficient (s). *A fortiori* a court of equity would not interfere, on the ground of an equitable set-off, to prevent the party from recovering a sum awarded to him for damages for a breach of contract, merely because there was an unsettled account between him and the other party, even in respect to dealings arising out of the same contract (t).

§ 1436a. However, where there were cross-demands between the parties, of such a nature, that if both were recoverable at law they would have been the subject of a set-off; then, and in such a case, if either of the demands were a matter of equitable jurisdiction, the set-off would have been enforced in equity. As, for example, if a legal debt were due to the plaintiff by the defendant, and the defendant was the assignee of a legal debt due to a third person from the plaintiff, which had been duly assigned to himself, a court of equity would set off the one against the other, if both debts could properly be the subject of a set-off at law (u). But except under special circumstances, courts of equity never allowed cross-demands existing in different rights to be set the one against the other, although agreement, express or implied, might confer that right (x). Nor would the mere fact of the cross-demand existing, of itself give equitable jurisdiction, nor the mere fact that one of the demands was held by a trustee, that is to say, that one of the demands, though still a legal demand, was, as regards beneficial ownership, the property of the person who was liable to the other demand (y). And where an equitable chose in

(q) *Ex parte Flint*, 1 Swanst. 33; *In re Goy & Co.*, *Farmer v. Goy*, [1900] 2 Ch. 149.

(r) *Freeman v. Lomas*, 9 Hare, 109.

(s) *Rawson v. Samuel*, Cr. & Ph. 161.

(t) *Rawson v. Samuel*, Cr. & Ph. 161; *Middleton v. Pollock*, *Ex parte Nugee*, L. R. 20 Eq. 29.

(u) *Clarke v. Cort*, Cr. & Phil. 154.

(x) *Freeman v. Lomas*, 9 Hare, 109; *Middleton v. Pollock*, *Ex parte Nugee*, L. R. 20 Eq. 29.

(y) *Middleton v. Pollock*, *Ex parte Nugee*, L. R. 20 Eq. 29.

action had been assigned, the debtor could not set off against the assignee a debt which had accrued to him from the assignor since the notice of assignment, though resulting from a contract entered into previously, unless from the nature of the transaction it appeared to have been intended by the original parties that the one should be set off against the other (z).

§ 1437. Thus, courts of equity, following the law, would not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they would not allow a set-off of debts accruing in different rights (a). But special circumstances might occur creating an equity, which would justify even such an interposition. Thus, for example, if a joint creditor fraudulently conducted himself in relation to the separate property of one of the debtors, and misapplied it, so that the latter was drawn in to act differently from what he would have done if he had known the facts, that would constitute, in a case of bankruptcy, a sufficient equity for a set-off of the separate debt, created by such misapplication against the joint debt (b). So, if one of the joint debtors were only a surety for the other, he might, in equity, set off the separate debt due to his principal from the creditor; for in such a case, the joint debt is nothing more than a security for the separate debt of the principal; and, upon equitable considerations a creditor, who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account for which the other was a security (c). Indeed, it may be generally stated, that a joint debt might, in equity, have been set off against a separate debt, where there was a clear series of transactions, establishing that there was a joint credit given on account of the separate debt (d).

§ 1437a. There is no doubt that courts of equity did eventually extend the doctrine of set-off, and claims in the nature of set-off, beyond the law, but they only did so where peculiar equities intervened between the parties (e). The cases in which a set-off was allowed on special grounds are so very various as to admit of no comprehensive enumeration. Some cases, however, illustrative of the doctrine, may readily be put. Thus, if an agent, having a title to an estate, should have allowed his principal to expend money upon the estate without any notice of that title, he would not have been permitted, after a recovery at law in ejectment, to maintain an action at law against

(z) *Watson v. Mid-Wales Railway*, L. R. 2 C. P. 593.

(a) *Middleton v. Pollock*, *Ex parte Nugee*, L. R. 20 Eq. 29; *Middleton v. Pollock*, *Ex parte Knight v. Raymond*, L. R. 20 Eq. 515.

(b) *Ex parte Stephens*, 11 Ves. 24; *Bechervaise v. Lewis*, L. R. 7 C. P. 372.

(c) *Ex parte Hanson*, 12 Ves. 346; s.c. 18 Ves. 252.

(d) *Vulliamy v. Noble*, 3 Meriv. 593.

(e) *Rawson v. Samuel*, Cr. & Ph. 161; *Jones v. Mossop*, 3 Hare, 568; *Freeman v. Lomas*, 9 Hare, 109; *Middleton v. Pollock*, *Ex parte Nugee*, L. R. 20 Eq. 29.

the principal for mesne profits; but courts of equity would require, that, to the extent of the improvements, there should be a set-off or compensation allowed to the principal, against the mesne profits (*f*).

§ 1437*b*. A person who purchased goods from a factor who sold them in his own name could set off a debt due to him from the factor personally in the same way as if the factor were the principal, unless the purchaser had notice that the factor was not the principal, nor was this right affected by the fact that the factor on selling in his own name without disclosing the agency was acting in contravention of the express directions of his principal (*g*). But the executors of a testatrix were not entitled to set off against a man who was but a debtor and a residuary legatee of the testatrix to the amount of the debt against the share of the debtor (*h*). Nor even now can a director of a company set off against a claim for a breach of trust any money due to him from the company (*i*).

§ 1438. We may conclude this very brief review of the doctrine of set-off, as recognised in courts of equity, a doctrine, which was practically of rare occurrence in cases not within the statutes of set-off, either at law generally, or in bankruptcy, by a few remarks upon the same subject, as it is found recognised in the civil law. In the latter, the doctrine was well known under the title of compensation, which may be defined to be the reciprocal acquittal of debts between two persons, who are indebted, the one to the other (*k*); or, as it is perhaps better stated by Pothier, compensation is the extinction of debts, of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another (*l*). The civil law itself expressed it in a still more concise form. “*Compensatio est debiti et crediti inter se contributio*” (*m*).

§ 1439. The civil law treated compensation as founded upon a natural equity, and upon the mutual interest of each party to have the benefit of the set-off, rather than to pay what he owed, and then to have an action for what was due to himself. “*Ideo, compensatio necessaria est, quia interest nostra potius non solvere, quam solutum repetere*” (*n*). Baldus adds another and very just reason, that it avoids circuity of action. “*Quod potest brevius per unum actum,*

(*f*) *Lord Cawdor v. Lewis*, 1 Y. & Coll. Ex. 427.

(*g*) *Ex parte Dixon, In re Henley*, 4 Ch. D. 133. See *Semenza v. Brinsley*, 18 C. B. N. S. 467.

(*h*) *In re Hodgson, Hodgson v. Fox*, 9 Ch. D. 673.

(*i*) *In re Carriage Co-operative Supply Association*, 27 Ch. D. 322.

(*k*) Domat, Civil Law, B. 4, tit. 2, § 1, art. 1.

(*l*) Pothier on Oblig. by Evans, n. 587 [n. 622 of French editions]. Pothier has examined the whole subject with great ability, and given a full exposition of the doctrines of the civil law, in his treatise on Obligations, Pt. 3, ch. 4, nn. 587 to 605 [nn. 622 to 640 of French editions].

(*m*) Dig. Lib. 16, tit. 2, f. 1.

(*n*) Dig. Lib. 16, tit. 2, f. 3. See also Inst. Lib. 4, tit. 6, § 30.

expediri compensando, incassum protraheret per plures solutiones et repetitiones ” (o).

§ 1440. It has been truly said, that the doctrine of set-off has been borrowed from the Roman jurisprudence. But there are several important differences between compensation in the civil law, and set-off in our law (p). In the first place, in our law, if the party has a right of set-off, he is not bound to exercise it; and if he does not exercise it, he is at liberty to commence an action afterwards for his own debt (q). But in the civil law it was otherwise; for the cross-debt to the same amount was by mere operation of law, and independent of the acts of the parties, extinguished (r). In support of this doctrine there are many texts of the civil law. “Posteaquam placuit inter omnes, id quod invicem debetur, IPSO JURE compensari (s). Unusquisque creditorem suum, eundemque debitorem, petentem summovet, si paratus est compensare (t). Si totum petas, plus petendo causa cadis (u). Si quis igitur compensare potens, solverit, condicere poterit, quasi indebito soluto ” (x).

§ 1441. In the next place, in our law, till the Judicature Act, 1873, the right of compensation or set-off was confined to debts, properly so called, or to claims strictly terminating in such debts. In the civil law, the right was more extensive; for not only might debts of a pecuniary nature be set off against each other, but debts or claims for specific articles of the same nature (as for corn, wine, or cotton) might also be set off against each other. All that was necessary was that the debt or claim to be compensated, should be certain and determinate and actually due, and in the same right, and of the same kind, as that on the other side (y). The general rule was: “Aliud pro alio, invito creditori, solvi non potest (z). Ejus, quod non

(o) Cited by Pothier on Oblig. n. 587 [n. 623 of French editions].

(p) Mr. Chancellor Kent, in *Duncan v. Lyon*, 3 Johns. Ch. 359, used the following language: “The doctrine of set-off was borrowed from the doctrine of compensation in the civil law. Sir Thomas Clarke shows the analogy in many respects, on this point, between the two systems; and the general rules in the allowance of compensation or set-off by the civil law, as well as by the law of those countries in which that system is followed, are the same as the English law. To authorise a set-off, the debts must be between the parties, in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts. [Dig. lib. 16, tit. 2, de Compensationibus, Code, lib. 4, tit. 31, l. 14, and Code, lib. 5, tit. 21, l. 1; Ersk. Inst. vol. 2, 525, 527; Pothier, Trait. des Oblig. Nos. 587 to 605; Ferrière sur Inst. tom. 6, 110, 113.]” *Whitaker v. Rush*, Ambler 407.

(q) Pothier, by Evans, App. 112, No. 13; *Baskerville v. Browne*, 2 Burr. 1229.

(r) Pothier on Oblig. n. 599 [635]; 1 Domat, B. 4, tit. 2, § 8, art. 4.

(s) Dig. Lib. 16, tit. 2, f. 21; Pothier, Pand. Lib. 16, tit. 2, n. 3.

(t) Dig. Lib. 16, tit. 2, f. 2; Pothier, Pand. Lib. 16, tit. 2, n. 1.

(u) Pothier, Pand. Lib. 16, tit. 2, n. 3.

(x) Ibid. n. 5; Dig. Lib. 16, tit. 2, f. 10, § 1.

(y) Pothier on Oblig. nn. 588, 590 [nn. 623, 626 of the French editions]; Pothier, Pand. Lib. 16, tit. 2, nn. 11 to 24; Cod. Lib. 4, tit. 31, l. 141.

(z) Pothier on Oblig. n. 588 [n. 623 of the French editions]; Dig. Lib. 12, tit. 1, l. 2, § 1.

ei debetur, qui convenitur, sed alii, compensatio fieri non potest (a). Quod in diem debetur, non compensabitur, antequam dies venit, quanquam dari oporteat (b). Compensatio debiti ex pari speci, et causâ dispari, admittitur; velut, si pecuniam tibi debeam, et tu mihi pecuniam debeas, aut frumentum, aut cætera, hujusmodi, licet ex diverso contractu, compensare vel deducere debes" (c). The only exception to the rule was, in cases of deposits; for it was said: "In causâ depositi compensatione locus non est; sed res ipsa reddenda est" (d).

§ 1442. In another provision of the civil law, we may distinctly trace an acknowledged principle of equity jurisprudence upon the same subject (e). The rule that compensation should be allowed of such debts only as were due to the party himself, and in the same right, had an exception in the case of sureties. A person who was surety for a debt might not only oppose, as a compensation, what was due from the creditor to himself, but also what was due to the principal debtor. "Si quid a fidejussore petatur, æquissimum est eligere fidejussorem, quod ipsi, an quod reo debetur, compensare malit; sed etsi, utrumque velit compensare, audiendus est" (f).

§ 1443. There was another exception in the civil law, which has not received the same favour in ours. It was generally true, that a debt, due from the creditor to a third person, could not be insisted on by the debtor, as a compensation, even with the assent of such third person: "Creditor compensare non cogitur quod alii, quam debitori suo, debet; quamvis creditor ejus pro eo, qui convenitur ob debitum proprium velit compensare" (g). Yet, where the debtor had procured a cession or assignment of the debt of such third person, he might, after notice to the creditor, insist upon it by way of compensation. "In rem suam procurator datus, post litis contestationem, si vice mutuâ conveniatur, æquitate compensationis utetur" (h).

§ 1444. These may suffice, as illustrations of the civil law on the subject of compensation or set-off. The general equity and reasonableness of the principles upon which the Roman superstructure is founded, make it a matter of regret, that they have not been transferred to their full extent into our system of equity jurisprudence. Why, indeed, in all cases of mutual debts, independently of any

(a) Cod. Lib. 4, tit. 31, l. 9; Pothier, Pand. Lib. 16, tit. 2, n. 15.

(b) Dig. Lib. 16, tit. 2, f. 7; Pothier, Pand. Lib. 16, tit. 2, n. 12.

(c) Pothier, Pand. Lib. 16, tit. 2, n. 22.

(d) Pothier, Pand. Lib. 16, tit. 2, n. 8; Cod. Lib. 4, tit. 31, l. 11; 1 Domat, Civ. Law, B. 4, tit. 2, § 2, art. 6.

(e) *Ante*, § 1350.

(f) Dig. Lib. 16, tit. 2, f. 5; Pothier, Pand. Lib. 16, tit. 2, n. 16; Pothier on Oblig. n. 595 [631].

(g) Dig. Lib. 16, tit. 2, f. 18; Pothier, Pand. Lib. 16, tit. 2, n. 16; Pothier on Oblig. n. 594 [629].

(h) Dig. Lib. 16, tit. 2, f. 18; Pothier, Pand. Lib. 16, tit. 2, n. 15; Pothier on Oblig. n. 594 [n. 629 of the French editions].

notion of mutual credit, courts of equity should not have at once supported and enforced the doctrine of the universal right of set-off, as a matter of conscience and natural equity, it is not easy to say. Having affirmed the natural equity, it seems difficult to account for the ground upon which they have refused the proper relief founded upon it. The very defect of the remedy at law furnishes an almost irresistible reason for such equitable relief. The doctrine of compensation has, indeed, been felicitously said to be among those things *quæ jure aperto nituntur* (i). The universality of its adoption in all the systems of jurisprudence, which have derived their origin from Roman fountains, demonstrates its persuasive justice and sound policy (k). The common law, in rejecting it from its bosom, seems to have reposed upon its own sturdy independence, or its own stern indifference. But the marvel is, that courts of equity should have hesitated to foster it, when their own principles of decision seem to demand the most comprehensive and liberal action on the subject.

§ 1444a. There were four essentials to a set-off under the statutes 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24—(a) it must have been for a liquidated sum (l); (b) it must have existed at the time of action brought (m); (c) it must have existed at the time of plea pleaded (n); and (d) it must have existed at the trial (o). The statutes of Geo 2 have been repealed, but the jurisdiction saved by the Statute Law Revision Act, 1884. Now, by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 3, the defendant may assert any equitable estate or right or other matter of equity. Further, by the Rules of the Supreme Court, 1883, Order XIX., rule 3, the defendant may set off, or set up by way of counterclaim against the claim of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the effect of a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross-claim. The claim contemplated by the rule is one available against the plaintiff personally (p), but a plaintiff cannot protect himself by sheltering behind a stalking horse in the shape of a trustee (q). But

(i) See Mr. Blunt's note to *Whitaker v. Rush*, Ambler, 408, note (6).

(k) See Pothier on Oblig. Pt. 3, ch. 4, nn. 587 to 605 [nn. 622 to 640 of the French editions]; 1 Stair's Inst. B. 1, ch. 18, § 6; Ersk. Inst. B. 3, tit. 4, § 11 to 20; Heinecc. Elem. Juris. Germ. Lib. 2, tit. 17, § 475. As to set-off in the administration of estates, see *Taylor v. Taylor*, L. R. 20 Eq. 155; *Middleton v. Pollock*, *Ex parte Nugee*, L. R. 20 Eq. 29; *White v. Cordwell*, L. R. 20 Eq. 644.

(l) *Crampton v. Walker*, 3 Ell. & E. 321.

(m) *Braithwaite v. Coleman*, 4 Nev. & M. 654; *Richards v. Jones*, 2 Ex. 471.

(n) *Dendy v. Powell*, 3 M. & W. 442.

(o) *Eyton v. Littledale*, 4 Ex. 159.

(p) *Baker v. Adam*, 102 L. T. 248; *Reeves v. Pope*, [1913] 1 K. B. 637.

(q) *Banks v. Jarvis*, [1903] 1 K. B. 549.

it may be in respect of a cause of action arising after the original action commenced, and before trial (r). If it came into existence *puis darrein continuance*, it may be raised by amendment (s).

(r) *Ellis v. Munson*, 35 L. T. 585; *Beddall v. Maitland*, 17 Ch. D. 174.

(s) *Ellis v. Munson*, 35 L. T. 585.

CHAPTER XXXVIII.

ESTABLISHING WILLS.

§ 1445. It has been already stated, in another part of these Commentaries, that the proper jurisdiction, as to the validity of last wills and testaments, belonged to other tribunals (*a*). Where a will respected personal estate, it belonged to the Court of Probate; and where it respected real estate, it belonged to the courts of common law. But, although this is regularly true, and courts of equity would not in contested litigation entertain jurisdiction to determine the validity of a will; yet whenever a will came before them, as an incident in a cause, they necessarily entertained jurisdiction to some extent over the subject; and if the validity of the will was admitted by the parties, or if it was otherwise established by the proper modes of proof, they acted upon it to the fullest extent. If either of the parties should afterwards bring a new suit, to contest the determination of the validity of the will so proved, the court of equity, which had so determined it, would certainly on the old practice have granted a perpetual injunction (*b*).

§ 1446. The usual manner in which courts of equity proceeded in such cases was this. If the parties admitted the due execution and validity of the will, it was deemed *ipso facto* sufficiently proved. If the will were of personal estate, and a probate thereof was produced from the proper court, that was ordinarily deemed sufficient. But if the parties were dissatisfied with the probate, and contested the validity of the will, the court of equity, in which the controversy was depending, would suspend the determination of the cause, in order to enable the parties to try its validity before the proper tribunal, and would then govern itself by the result. If the will were of real estate, and its validity were contested in the cause, the court would, in like manner, direct its validity to be ascertained, either by directing an issue to be tried, or an action of ejectment to be brought at law; and would govern its own judgment by the final result (*c*). If the will

(*a*) *Ante*, § 184, 238; *Allen v. McPherson*, 1 H. L. C. 191; *Priestman v. Thomas*, 9 P. D. 210.

(*b*) *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 628.

(*c*) *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 628; *Allen v. McPherson*, 1 H. L. C. 191; *Priestman v. Thomas*, 9 P. D. 210.

were established in either case, a perpetual injunction might be decreed (*d*).

§ 1447. But it was often the primary, although not the sole, object of a suit in equity, brought by devisees and others in interest, to establish the validity of a will of real estate; and thereupon to obtain a perpetual injunction against the heir-at-law, and others, to restrain them from contesting its validity in future. In such cases the jurisdiction, exercised by courts of equity, was somewhat analogous to that exercised in cases of bills of peace; and it was founded upon the like considerations in order to suppress interminable litigation, and to give security and repose to titles (*e*). In every case of this sort, courts of equity would, unless the heir waived it, direct an issue of *devisavit vel non*, to ascertain the validity of the will (*f*). According to the course of modern decisions, the heir had an option either to bring an action of ejectment, or to have an issue of *devisavit vel non*. But it would not feel itself bound by a single verdict either way, if it were not entirely satisfactory; but it would direct new trials, until there was no longer any reasonable ground for doubt. But a new trial would not be directed unless there were substantial ground for believing that, on a second trial, other evidence of a weighty nature bearing against the existing conclusion could and would be produced, which was not heard before (*g*). The general rule established in courts of equity was, that, upon every such issue and trial at law, all the witnesses to the will should be examined, if practicable, unless the heir should have waived the proof. But the rule was not absolutely inflexible, but it would yield to peculiar circumstances (*h*). When by these means, upon a verdict, the validity of the will was fully established, the court would by its decree declare it to be well proved, and that it ought to be established, and would grant a perpetual injunction (*i*).

§ 1448. If, however, the devisees had no further immediate object, than merely to establish the will by perpetuating the testimony of the witnesses thereto, this was and may be done (as we shall hereafter see) by a proper bill for the purpose; and the latter is, indeed, what is usually meant by proving a will in chancery (*k*).

§ 1449. It may be proper, also, to take notice, in this place (although it more frequently arose in the exercise of the auxiliary or

(*d*) *Leighton v. Leighton*, 1 P. Wms. 671.

(*e*) *Leighton v. Leighton*, 1 P. Wms. 671. See *ante*, § 853, 859. The heir-at-law cannot come into equity, for the purpose of having an issue to try the validity of the will at law, unless it is by consent; for he may bring an ejectment. But if there are any impediments to the proper trial of the merits on such an ejectment, he may come into equity to have them removed. *Jones v. Jones*, 3 Meriv. 161, 170; *Bates v. Graves*, 2 Ves. Jun. 288. See also *Bootle v. Blundell*, 19 Ves. 502.

(*f*) *Pemberton v. Pemberton*, 11 Ves. 53; s.c. 13 Ves. 290; *Cooke v. Cholmondeley*, 2 Mac. & G. 18. (g) *Waters v. Waters*, 2 De G. & Sm. 591.

(*h*) *Tatham v. Wright*, 2 Russ. & M. 1.

(*i*) Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, pp. 297, 298, and cases before cited.

(*k*) 3 Black. Comm. 450.

assistant jurisdiction), that courts of equity, in cases of this sort, where the original will was lodged in the custody of the registrar of the Probate Court, and it might be necessary to be produced before witnesses, resident abroad, whose testimony was to be taken under a commission to prove its due execution, would direct the original will to be delivered out by such officer to a fit person, to be named by the party in interest; such party first giving security, to be approved by the judge of the Ecclesiastical Court, to return the same within a specified time. If there were any dispute about the security for the safe custody and return of the will, it was referred to a master to settle and adjust the same (*l*). If the commission was to be executed within the realm, and the witnesses were therein, the court would direct the original will to be brought into its own registry, to lie there, until the court had done with it (*m*); or to be delivered out on giving security (*n*). It is doubtful if this procedure would be followed in England at the present time.

§ 1449a. In a case where the title was derived under a will which was suspicious, it appearing that the heir had failed in an action of ejectment, and afterwards in a motion for a new trial, and where the master reported in favour of the title; the Lord Chancellor held, on appeal, reversing the decree of the Vice-Chancellor, that it was more consonant with the principles of the court, that the validity of the will should be conclusively determined, if possible, between the vendor and the heir, than that it should be left to be litigated between the heir and purchaser, after the purchase-money had been paid (*o*). In a case before Vice-Chancellor Wood, at the suit of the devisee against the heir, this subject was very elaborately discussed, and the history of this branch of equity jurisprudence traced with great minuteness. As the practice has ceased to possess any importance for at least half a century, it is sufficient to refer to the case by name (*p*).

§ 1449b. But it is now settled that a purchaser of real estate, the title to which is derived under a will, is not entitled to have the will established, or to have the conveyance of the heir to him, unless some reasonable ground exists for doubting the validity of the will (*q*).

(*l*) *Frederick v. Aynscombe*, 1 Atk. 627.

(*m*) *Frederick v. Aynscombe*, 1 Atk. 627.

(*n*) *Morse v. Roach*, 2 Str. 961.

(*o*) *Grove v. Bastard*, 2 Phil. 619.

(*p*) *Boyse v. Rossborough*, Kay 71, 1 Kay & J. 124, 3 De G. M. & G. 817, 6 H. L.

C. 1.

(*q*) *M'Culloch v. Gregory*, 3 Kay & J. 12.

CHAPTER XXXIX.

AWARDS.

§ 1450. COURTS of equity also formerly exercised a large jurisdiction in matters of AWARDS. But, by means of statutes finally embodied in the Arbitration Act, 1889 (52 & 53 Vict. c. 49), the jurisdiction came to be rarely exercised. It may not, however, be without use to refer to some of the more ordinary cases in which that jurisdiction was originally exerted, and still may be exerted, in cases where no statute interferes with the due exercise thereof. And it is constantly to be borne in mind that the subsequent remarks, even when not so expressly qualified, are to be understood with this limitation, that there are no statutable provisions which vary or control the general jurisdiction of equity in matters of award (a).

§ 1451. In cases of fraud, mistake, or accident, courts of equity could, in virtue of their general jurisdiction, interfere to set aside awards upon the same principles, and for the same reasons, which justified their interference in regard to other matters, where there was no adequate remedy at law (b). And if there were no statute to the contrary, an agreement by the party on entering into an arbitration, not to bring any action or suit in equity to impeach the award made under it, was held not to be obligatory, if there were in fact, from fraud, or mistake, or accident, or otherwise, a good ground to impeach it, or to require it to be set aside (c). But if the parties had agreed to leave the determination of matters of law to the arbitrator, the award could not be impeached in equity for error in law any more than it could in a court of common law (d).

§ 1452. At the common law there was no jurisdiction to set aside an award except upon a reference under an order of the court; and every objection must have been based upon matter apparent upon the face of the award, or of some paper incorporated therewith under the

(a) Com. Dig. Chancery, 2 K. 1 to 6; Bac. Abr. *Arbitration and Award*, B. The standard textbook usually consulted is Russell, *Arbitration and Award*.

(b) *Emery v. Wase*, 5 Ves. 846; *Mills v. Bowyers' Co.*, 3 K. & J. 66.

(c) See *Nichols v. Chalie*, 14 Ves. 264, 269; *Nichols v. Roe*, 3 Myl. & K. 431; *Street v. Rigby*, 6 Ves. 815; *Cheslyn v. Dalby*, 2 Y. & C. Ex. 170.

(d) *Young v. Walter*, 9 Ves. 364. See *Doe v. Emmerson*, 9 L. T. O. S. 199.

hand, or hand and seal, of the arbitrator or umpire (e). It has been decided that the objection might be based upon matter appearing in an affidavit of an arbitrator (f). This decision has been canvassed, but met with the approval of no less an authority than Lord Blackburn (g). Thus, for example, fraud, partiality, misconduct, or mistake of the arbitrators, was not admissible to defeat it. But courts of equity would, in all such cases, grant relief, and, upon due proofs, would set aside the award, and now the rule of equity will prevail. The grounds on which an award will be set aside are, first, that the arbitrators have awarded what was out of their power. Secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption, as if without reason they will not hear a witness. Thirdly, that they have proceeded upon mere mistake, which they themselves admit (h). Corruption cannot be proved by the admission of the arbitrator (i).

§ 1453. In regard to a mistake of the arbitrators, it may be in a matter of fact, or in a matter of law. If upon the face of the award, there is a plain mistake of law, or of fact, material to the decision, which misled the judgment of the arbitrators, there can be little or no reason to doubt that courts of equity will grant relief. But the difficulty is, whether the mistake of fact or of law is to be made out by extrinsic evidence; and, whether a mistake of law upon a general submission, involving the decision both of law and of fact, constitutes a valid objection. Upon these points, the decisions of courts of law and courts of equity are not reconcilable with each other; and it is not easy to lay down any doctrine, which may not be contradicted by some authority.

§ 1454. Perhaps the following will be found to be the doctrines most reconcilable with the leading authorities. Arbitrators, being the chosen judges of the parties, are, in general, to be deemed judges of the law, as well as of the facts, applicable to the case before them. If no reservation is made in the submission, the parties are presumed to agree, that every question, both as to law and fact, necessary for the decision, is to be included in the arbitration. Under a general submission, therefore, the arbitrators have rightfully a power to decide on the law and on the fact. And, under such a submission, they are not bound to award on mere dry principles of law; but they make their award according to the principles of equity and good conscience (k).

(e) *Kent v. Elstob*, 3 East, 18; *Sharman v. Bell*, 5 M. & S. 504; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189.

(f) *Jones v. Corry*, 5 Bing. N. C. 187.

(g) *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 Ex. 221, 232.

(h) *Per* Lord Commissioner Wilson, *Morgan v. Mather*, 2 Ves. 15, 18; *Mills v. Bowyers' Co.*, 3 Kay & J. 66.

(i) *In re Whiteley & Roberts*, [1891] 1 Ch. 558.

(k) *Morgan v. Mather*, 2 Ves. Jun. 15; *Produce Brokers' Co. v. Olympia Oil and Cake Co.*, [1916] A. C. 314.

Subject, therefore, to the qualifications, hereafter mentioned, a general award cannot be impeached collaterally, or by evidence *aliunde*, for any mistake of law or of fact, unless there be some fraud or misbehaviour in the arbitrators. These qualifications will now be stated.

§ 1455. First; in regard to matters of law. If arbitrators refer any point of law to judicial inquiry, by spreading it on the face of their award, and they mistake the law in a palpable and material point, their award will be set aside (*l*). If they admit the law, but decide contrary thereto upon principles of equity and good conscience, although such intent appear upon the face of the award, it will constitute no objection to it. If they mean to decide strictly according to law, and they mistake it, although the mistake is made out by extrinsic evidence, that will be sufficient to set it aside (*m*). But their decision upon a doubtful point of law, or in a case where the question of law itself is designedly left to their judgment and decision, will generally be held conclusive (*n*).

§ 1456. Secondly; in regard to matters of fact, the judgment of the arbitrators is ordinarily deemed conclusive (*o*). If, however, there is a mistake of a material fact apparent upon the face of the award; or, if the arbitrators admit the mistake, and state it (although it is not apparent on the face of the award); and if, in their own view, it is material to the award, then, although made out by extrinsic evidence, courts of equity will grant relief (*p*).

§ 1457. Courts of equity would not enforce the specific performance of an agreement to refer any matter in controversy between adverse parties, deeming it against public policy to exclude from the appropriate judicial tribunals of the State any persons who, in the ordinary course of things, have a right to sue there (*q*). Neither will they, for the same reason, compel arbitrators to make an award (*r*); nor, when they have made an award, will they compel them to disclose

(*l*) *Knox v. Symmonds*, 1 Ves. Jun. 369; *Kent v. Elstob*, 3 East, 18.

(*m*) *Young v. Walter*, 9 Ves. 364, 366; *Blennerhassett v. Day*, 2 Ball & Beat. 120; *Delver v. Barnes*, 1 Taunt. 48; *Richardson v. Nourse*, 3 Barn. & Ald. 237.

(*n*) *Young v. Walter*, 9 Ves. 364; *Chace v. Westmore*, 13 East, 357; *Campbell v. Twemlow*, 1 Price, 81; *Steff v. Andrews*, 2 Mad. 6, 9; *Wood v. Griffith*, 1 Swanst. 43; *Sharman v. Bell*, 5 M. & S. 504.

(*o*) See *Price v. Williams*, 1 Ves. June. 365; s.c. 3 Bro. C. C. 163; *Morgan v. Mather*, 2 Ves. Jun. 15 to 18, 20, 22; *Dick v. Milligan*, 2 Ves. Jun. 23; *Goodman v. Sayers*, 2 Jac. & Walk. 249, 259.

(*p*) *Knox v. Symmonds*, 1 Ves. Jun. 369; *Rogers v. Dallimore*, 6 Taunt. 111; *In re Dare Valley Ry.*, L. R. 6 Eq. 429; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418.

(*q*) *Agar v. Macklew*, 2 Sim. & St. 418. See *In re Smith and Nelson*, 25 Q. B. D. 545.

(*r*) Kyd on Awards, ch. 4, p. 100 (2nd edit.). In this respect our law differs from the Roman law; for by the latter, arbitrators would, unless under special circumstances, be compelled to make an award, when they had taken the office upon themselves. Dig. Lib. 4, tit. 8, f. 3, § 1, 3; Kyd on Awards, ch. 4, pp. 98, 99, and note (2nd edit.).

the grounds of their judgment (*s*). The latter doctrine stands upon the same ground of public policy as the others; that is to say, in the first instance, not to compel a resort to these domestic tribunals, and, on the other hand, not to disturb their decisions, when made, except upon very cogent reasons.

§ 1458. When an award has actually been made, and it is unimpeached and unimpeachable, it constitutes a bar to any suit for the same subject-matter, both at law and in equity. And courts of equity will, in proper cases, enforce a specific performance of an award, which is unexceptionable, and which has been acquiesced in by the parties, if it is for the performance of any acts by the parties *in specie*, such as a conveyance of lands; and such a specific performance will be decreed, almost as if it were a matter of contract, instead of an award (*t*).

§ 1458*a*. A court of equity has power by injunction to prevent an arbitrator against whom corruption is alleged, from proceeding with an arbitration (*u*). But a court of equity has not, even since the Judicature Act, power by injunction to prevent an arbitrator from proceeding with an arbitration, on the sole ground that the proposed arbitration is on a matter outside the agreement to refer, and that the proceedings will therefore be futile and vexatious. For the provisions of sub-s. 8, s. 25, of the Judicature Act, 1873, that "a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made," does not confer on a court of equity any power it did not formerly possess (*x*).

§ 1459. But, as the specific performance of awards, as well as of contracts, rests in the sound discretion of the courts, if, upon the face of the award or otherwise, it appears that there are just objections to enforcing it, courts of equity will not interfere (*y*). On the other hand, where an award has been long acquiesced in or acted upon by both parties, even although objections might have been originally urged against it, an application to set it aside will not be entertained (*z*).

§ 1460. It is curious to remark the coincidences between the civil law and our law, in regard to arbitrations and awards. Whether we are to attribute this to the origin of the latter in the established jurisprudence of the former; or to the same good sense, prevailing

(*s*) *Anon.*, 3 Atk. 644. See *Willesford v. Watson*, L. R. 14 Eq. 572; *Law v. Garret*, 8 Ch. D. 26.

(*t*) *Wood v. Griffith*, 1 Swanst. 43; *Nickels v. Hancock*, 7 De G. M. & G. 300.

(*u*) *Pickering v. Cape Town Ry.*, L. R. 1 Eq. 84; *Beddow v. Beddow*, 9 Ch. D. 89.

(*x*) *North London Ry. v. Great Northern Ry.*, 11 Q. B. D. 30.

(*y*) *Auriol v. Smith*, 1 Turn. & Russ. 187; *Wood v. Griffith*, 1 Swanst. 43; *Nickels v. Hancock*, 7 De G. M. & G. 300.

(*z*) *Jones v. Bennett*, 1 Bro. P. C. 528; *Cf. Rogers v. Dallimore*, 1 Taunt. 111.

in different nations, and establishing the like equitable principles on the same subject, founded on public policy and private convenience, it is not necessary to discuss. But it is certain that the Roman law has much to commend it in the reasonableness of its doctrines.

§ 1461. Arbitration, called compromise (*compromissum*), was a mode of terminating controversies much favoured in the civil law, and was usually entered into by reciprocal covenants or obligations, with a penalty, or with some other certain or implied loss (a); and the award was deemed to partake of the character of a judicial proceeding (b). “*Compromissum ad similitudinem judiciorum redigitur, et ad finiendas lites pertinet*” (c). *Ex compromisso placet exceptionem non nasci, sed pœnæ petitionem*” (d). The general conclusiveness of awards, when made within the legitimate powers of the arbitrators, was firmly established upon the same principles, which ought universally to prevail, to suppress litigation. “*Stari autem debet sententiæ arbitri, quam de re dixerit, sive æqua, sive iniqua sit; et sibi imputet, qui compromisit*” (e).

§ 1462. The leading, though not the only, exception to the conclusiveness of awards, when regularly made, was the fraud or corruption of the parties, or of the arbitrators. “*Posse eum uti doli mali exceptione.*” Again: “*Etiam si appellari non potest, doli mali exceptionem in pœnæ petitione obstaturam*” (f). Another exception was, that the arbitrators had, in their award, exceeded their authority; for if they had, it was void. “*De officio arbitri tractantibus sciendum est, omnem tractatum ex ipso compromisso sumendum. Nec enim aliud illi licebit, quam quod ibi, ut efficere posset, cautum est. Non ergo quodlibet statuere arbiter poterit, nec in re qualibet; nisi de quâ re compromissum est, et quatenus compromissum est*” (g).

§ 1463. Subject to exceptions of this nature, it has been justly remarked by an eminent judge, that the prætor at Rome would not

(a) Pothier, Pand. Lib. 4, tit. 8, n. 13, 14; Dig. Lib. 4, tit. 8, f. 11, § 2, 3; ibid. f. 13, § 1, ibid. f. 27, § 6.

(b) If there was a simple agreement to stand by the award, without any penalty or equivalent, it seems that in the civil law there was originally no remedy to enforce it. Justinian, in some cases, but not adequately (as it should seem), provided for this defect. See Kyd on Awards, ch. 1, pp. 8, 9 (2nd edit.), which cites Dig. Lib. 4, tit. 8, f. 27, § 6, 7, where it is said: “*Et, si quis presens arbitrum sententiam dicere prohibuit, pœna committetur. [§ 6.] Sed, si pœna non fuisset adjecta compromisso, sed simpliciter, sententiæ stari quis promiserit, incerti adversus eum foret actio. [§ 7.]*” See also Cod. Lib. 2, tit. 56, l. 4, 5.

(c) 1 Domat, B. 1, tit. 14, § 1, art. 2; Dig. Lib. 4, tit. 8, f. 1; Pothier, Pand. Lib. 4, tit. 8, n. 1.

(d) 1 Domat, B. 1, tit. 14, § 1, art. 3; Dig. Lib. 4, tit. 8, f. 2.

(e) Dig. Lib. 4, tit. 8, f. 27, § 2; Pothier, Pand. Lib. 4, tit. 8, nn. 39, 40.

(f) Dig. Lib. 4, tit. 8, f. 32, § 14; ibid. l. 31; Pothier, Pand. Lib. 4, tit. 8, nn. 40, 47, 48.

(g) Dig. Lib. 4, tit. 8, f. 32, § 15; 1 Domat, B. 1, tit. 4, § 2, art. 6; Pothier, Pand. Lib. 4, tit. 8, nn. 41, 42.

interfere with the decisions of these domestic tribunals for the very reasons which have been adopted in modern times; because they put an end to suits, and the arbitrators were judges of the parties' own choice (*h*). “Tametsi neminem prætor cogit arbitrium recipere (quoniam hæc res libera et soluta est, et extra necessitatem jurisdictionis posita); attamen, ubi semel quis in se receperit arbitrium, ad curam et sollicitudinem suam hanc rem pertinere prætor putat; non tantum, quod studeret lites finire, verum quoniam non deberent decipi, qui eum, quasi virum bonum, disceptatorem inter se eligerunt” (*i*). Indeed, when once arbitrators had taken upon themselves that office they were compellable by the prætor to make an award. “Quisquamne potest negare, æquissimum fore, prætorem interponere se debuisse, ut officium, quod in se recepit, impleret. Et quidem arbitrum cujuscunque dignitatis coget officio, quod suscepit perfungi” (*k*). In this respect, there is a marked distinction between our law and the civil law (*l*).

(*h*) Mr. Chancellor Kent, in *Underhill v. Van Cortlandt*, 2 Johns. Ch. 368.

(*i*) Dig. Lib. 4, tit. 8, f. 3, § 1; Pothier, Pand. Lib. 4, tit. 8, n. 22.

(*k*) Dig. Lib. 4, tit. 8, f. 3, § 1, 3; Kyd on Awards, 98, 99, and note (2nd London edit.).

(*l*) *Ante*, § 1457.

CHAPTER XL.

WRITS OF NE EXEAT REGNO AND SUPPLICAVIT.

§ 1464. HAVING thus reviewed most of the branches of the exclusive jurisdiction of courts of equity, which arise from or are dependent upon, the subject-matter of the controversy, we are next led to the consideration of those branches of exclusive jurisdiction, which arise from, or are dependent upon, the nature of the remedy to be administered. The peculiar remedies in equity in cases of concurrent jurisdiction, have already been fully discussed; and much, therefore, which would otherwise be appropriate for remark in this place, has been already anticipated. The peculiar remedies connected with the exclusive jurisdiction in equity seem to have been principally the process of bill of discovery, properly so called; the process of bill for perpetuating evidence; and the processes, called the writ of NE EXEAT REGNO, and the writ of SUPPLICAVIT. The two former are properly embraced in what is called the auxiliary or assistant jurisdiction of courts of equity; and will, therefore, be reserved for examination hereafter. The two latter will be discussed in the present chapter.

§ 1465. The writ of *Ne exeat regno*, or, as it is sometimes termed, *Ne exeat regnum*, is a prerogative writ, which is issued, as its name imports, to prevent a person from leaving the realm (*a*). It is said that it is a process unknown to the ancient common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure (*b*). Its origin is certainly obscure. But it may be traced up to a very early period, although some have thought that its date is later than the reign of King John, since, by the great charter granted by him, the unlimited freedom to go from and return to the kingdom at their pleasure, was granted to all subjects. “*Liceat unicuique de cætero exire de regno nostro, et redire salvo et secure per terram et per aquam, salva fide nostra, nisi tempore guerræ, per aliquod breve tempus, propter communem utilitatem regni*” (*c*). The period

(*a*) Beames on *Ne Exeat*, p. 1; 1 Black. Comm. 137, 266. Most of the materials, which are contained in this chapter, have been drawn from the concise but perspicuous treatise of Mr. Beames, entitled “*A Brief View of the Writ of Ne Exeat Regno*” (London, 1812). I have not omitted, however, to compare the observations of the author with the original authorities.

(*b*) Beames on *Ne Exeat*, p. 1.

(*c*) *Ibid.* p. 3.

between the reign of King John and that of Edward I. has been accordingly assigned by some writers as the probable time of its introduction. A proceeding somewhat similar in its nature and objects, though not in the precise form of the modern writ, is distinctly mentioned by Britton (*d*); and the statute of 5 Ric. 2, c. 2, ss. 6, 7, prohibited all persons whatsoever from going abroad, excepting lords and great men, and merchants and soldiers (*e*).

§ 1466. In Fitzherbert's *Natura Brevium*, two forms of writs are given against subjects leaving the realm without licence, the one applicable to clergymen, and the other to laymen (*f*). And it is there remarked by Fitzherbert, that, by the common law, every man may go out of the realm at his pleasure, without the king's leave; yet, because every man is bound to defend the king and his realm, therefore the king, at his pleasure, by his writ, may command a man, that he go not beyond the seas, or out of the realm, without licence; and, if he do the contrary, he shall be punished for disobeying the king's command. From this language, it may be inferred, as his opinion, that the right of the king was a part of the common law, not at all incompatible with the ordinary right of the subject to leave the realm; but a restriction upon that right, which might be imposed by the crown for great political purposes. This is manifestly the view of the matter taken by Lord Coke, who deems it a part of the prerogative of the crown, at the common law, and not dependent upon any statute *pro bono publico regis et regni* (*g*).

§ 1467. Be the origin of this writ, however, as it may, it was originally applied only to great political objects and purposes of state, for the safety or benefit of the realm. The time when it was first applied to mere civil purposes, in aid of the administration of justice, is not exactly known, and seems involved in the like obscurity as its primitive existence. It seems, however, to have been so applied as early as the reign of Queen Elizabeth (*h*). In the reign of King James I. it seems to have been so firmly established, as a remedial civil process, grantable in chancery, that it was made the subject of one of Lord Bacon's Ordinances. It is there declared, that "Writs of *Ne exeat regno* are properly to be granted according to the suggestion of the writ in respect of attempts prejudicial to the king and state; in which case the Lord Chancellor will grant them, upon prayer of any

(*d*) Britton, ch. 112, cited in Beames on *Ne Exeat*, pp. 4, 5.

(*e*) Beames on *Ne Exeat*, p. 6.

(*f*) Fitz. Nat. Brev. 85

(*g*) 2 Co. Inst. 54; 3 Co. Inst. ch. 84, pp. 178, 179; Com. Dig. Chancery, 4 B.

(*h*) Tothill, in his *Transactions* (p. 136), mentions three cases, one in the 32nd of Elizabeth, and two in the 19th of James I. *Ex parte Bruncker*, 3 P. Wms. 312; *Flack v. Holm*, 1 J. & W. 405. See also Beames, Ord. of Chanc. p. 40, note (148); Beames on *Ne Exeat*, p. 16. A copy of the modern writ will be found in Beames on *Ne Exeat*, pp. 19, 20, and *Hinde's Practice*, p. 613. A similar process issued out of the Exchequer in crown cases: *Att.-Gen. v. Mucklow*, 1 Price, 289.

of the principal secretaries, without cause showing, or upon such information as his lordship shall think of weight. *But otherwise also they may be according to the practice of long time used*, in case of interlopers in trade, great bankrupts, in whose estates many subjects are interested, or other cases that concern multitudes of the king's subjects; also in case of duels and divers others" (i).

§ 1468. The ground, then, upon which it is applied to civil cases being, as is here stated, custom or usage; it has been in practice uniformly confined to cases within the usage, and therefore it is perhaps impossible to expound its true use or limitation upon principle (k). It has been strongly said, that it is applied to cases of private right with great caution and jealousy (l).

§ 1470. In general, it may be stated, that formerly the writ of *Ne exeat regno* was not granted unless in cases of equitable debts and claims; or if a legal debt, one which was ascertained by evidence of belief, but subject to the result of taking an account; for, in regard to civil rights, it was treated as in the nature of equitable bail (m). If bail was not required at law, that furnished no ground for the interference of a court of equity, to do what in effect, as to legal demands, the law inhibited (n).

§ 1471. It has been said in the preceding remarks, that, in general, the writ of *Ne exeat regno*, lay only upon equitable debts and claims. There were to this general statement two recognised exceptions, and two only. The one was where alimony had been decreed in the Ecclesiastical Court to a wife, whose right would be prejudiced if the writ did not issue against her husband about to quit the realm, the Ecclesiastical Courts having no jurisdiction to exact security, a jurisdiction first conferred on the Divorce Court by section 32 of the 20 & 21 Vict. c. 85, from the husband (o). The other was the case of an account, on which a balance was admitted by the defendant, but a larger claim was insisted on by the creditor (p).

§ 1472. The learned author also instanced the case of alimony decreed to the wife in chancery. This subject has already been discussed (q), and the only occasions on which the court interfered were during the Commonwealth, when the court exercised jurisdiction

(i) Beames, Ord. in Chanc. pp. 39, 40, Ord. 89; Beames on *Ne Exeat*, pp. 16, 17.

(k) *Ex parte Brunker*, 3 P. Will. 313; *Etches v. Lance*, 7 Ves. 417; *De Carrière v. De Calonne*, 4 Ves. 590.

(l) *Tomlinson v. Harrison*, 8 Ves. 32; *Whitehouse v. Partridge*, 3 Swanst. 365.

(m) Beames on *Ne Exeat*, p. 30; *Ex parte Brunker*, 3 P. Will. 312; *Atkinson v. Leonard*, 3 Bro. Ch. C. 218; *Flack v. Holm*, 1 J. & W. 405. See *Colverson v. Bloomfield*, 29 Ch. D. 341.

(n) *Crosly v. Marriot*, 2 Dick. 609; *Gardner v. —*, 15 Ves. 444.

(o) *Vandergucht v. De Blaquiere*, 8 Sim. 315; 5 M. & Cr. 229. An appeal pending was an answer to the application for a writ *ne exeat regno*; *Street v. Street*, Turn. & R. 322.

(p) *Flack v. Holm*, 1 Jac. & W. 405; *Thompson v. Smith*, 34 L. J. Ch. 412.

(q) *Ante*, § 1421.

in matrimonial cases, and where the husband had forfeited his recognizances by breach of condition to keep the peace towards his wife, or where the claim was in the nature of an equity to a settlement. These were obviously all claims of an equitable nature, and not true exceptions. It may well be doubted if the jurisdiction would have been maintained in later times.

§ 1473. In regard to a bill for an account, where there was a definite sum proved or admitted to be due by the defendant to the plaintiff, but a larger sum was claimed by the latter, there was not any real deviation from the appropriate jurisdiction of courts of equity (r); for matters of account are properly cognizable therein. The writ of *Ne exeat regno* may, therefore, well be supported as a process in aid of the concurrent jurisdiction of courts of equity, and, accordingly, it is now put upon this intelligible and satisfactory ground.

§ 1474. As to the nature of the equitable demand, for which a *Ne exeat regno* would be issued; it must have been certain in its nature, and actually payable, and not contingent. It should also have been for some debt or pecuniary demand. It would not lie, therefore, in a case where the demand was of a general unliquidated nature, or was in the nature of damages (s). The equitable debt need not, however, have been directly created between the parties. It would have been sufficient if it were fixed and certain. Thus the *cestui que trust*, or assignee of a bond, might have a writ of *Ne exeat regno* against the obligor (t).

§ 1475. We may conclude what is thus briefly said upon this subject, by stating that the writ would not have been granted on a bill for an account in favour of a plaintiff, who was a foreigner out of the realm, because he could not be compelled to appear and account. And, on the other hand, it might have been granted against a foreigner transiently within the country, although the subject-matter originated abroad, at least to the extent of requiring security from him to perform the decree made on the bill filed (u).

§ 1475a. The power to arrest a defendant on mesne process in common law actions was taken away by the statute 1 & 2 Vict. c. 110 in the case of inferior courts, and modified in the case of the superior courts so far as to require a judge's order. The statute does not apply to actions at the suit of the crown. The power was still further restricted by section 6 of the Debtors Act, 1869. Where the debt amounted to £50 or upwards, and could only have been

(r) *Flack v. Holm*, 1 Jac. & W. 405; *Thompson v. Smith*, 34 L. J. Ch. 412.

(s) *Sherman v. Sherman*, 3 Bro. C. C. 370, and notes; *Flack v. Holm*, 1 J. & W. 405; *Thompson v. Smith*, 34 L. J. Ch. 412.

(t) *Grant v. Grant*, 3 Russ. 598; *Leake v. Leake*, 1 Jac. & Walk. 605; *Howkins v. Howkins*, 1 Dr. & Sm. 75.

(u) *Flack v. Holm*, 1 J. & W. 405; *Smith v. Nethersole*, 2 Russ. & M. 450.

sued for in a superior court of common law prior to this statute, the plaintiff is bound by the terms of the sections (x). It is essential for the plaintiff to show (a) that the debt which must be a legal and not an equitable claim, amounts to £50 or upwards; (b) that there is reasonable ground for the belief that the defendant is about to quit the realm; and (c) that the prosecution of the action will be materially prejudiced. Failure to prove any one of these matters is fatal to the application (y). Under the section the defendant may be ordered to be imprisoned for six months unless he gives security not exceeding the amount of the debt that he will not go out of England without leave of the court. With this exception, the statute has abolished arrest on mesne process. The practice is regulated by Rules of the Supreme Court, 1883, Order LXIX.

§ 1476. The other process, to which we have alluded, as belonging to the exclusive jurisdiction of chancery, is the writ of *Supplicavit*. It was in the nature of the process at the common law to find sureties of the peace upon articles filed by a party for that purpose (z). It was, however, rarely used, as the remedy at the common law was in general adequate, although (as we have seen (a)), it was sometimes resorted to by a wife against her husband; because in that case it was said, that the Court of Chancery, as an incident, might grant maintenance or alimony to the wife, if she was compelled to live apart from her husband.

§ 1477. Lord Chief Baron Gilbert has given a full description of the nature and objects of this writ; and it will be sufficient for all the purposes of our present inquiry to state them in his words: "It is granted upon complaint and oath made of the party, where any suitor of the court is abused, and stands in danger of his life, or is threatened with death by another suitor. The contemnor is taken into custody, and must give bail to the sheriff; and, if he moves to discharge the writ of *supplicavit*, the court hears both parties on affidavit, and continues or discharges it, as the case appears before them. If they order the contemnor to give security for his good

(x) *Drover v. Beyer*, 13 Ch. D. 242.

(y) *Drover v. Beyer*, 13 Ch. D. 242.

(z) See *Baynum v. Baynum*, Ambler, 63, 64. In Lord Bacon's Ordinances there is one regulating the issuing of this writ. Ord. 87, in Beames's Ord. Ch. p. 39. On this Mr. Beames has remarked in his note (144), "This writ, as now issuing, is founded on the statute 21 Jac. 1, c. 8, which must have passed about five years after the making of the present Ordinances, if they really were published on the 29th Jan. 1618, as asserted in the judicial authority of the Master of the Rolls, p. 100. In addition to the authorities cited in the notes subjoined to Heyn's case, the reader may be referred to *Stoell v. Botelar*, 2 Ch. 68; *Ex parte Gumbleton*, 9 Mod. 222; s.c. 2 Atk. 70; *Hilton v. Biron*, 3 Salk. 248; *Ex parte Lewis*, Mos. 191; *Ex parte Gibson*, Mos. 198; Gilb. For. Rom. 202; Com. Dig. Chancery, 4 R., and *Forcible Entry*, D. 16, 17. The Collec. Jurid. 193, carries *supplicavit*s so high as the reigns of Henry VII. and Henry VIII., when both parties, plaintiff and defendant, were bound over to their good behaviour."

(a) *Ante*, § 1421.

behaviour (for this writ is in the nature of a Lord Chief Justice's warrant to apprehend a man for a breach of the peace), he must do it by recognizance, to be taken before one of the masters of the court, who must be in the commission of the peace. He is to find sureties to be of his good behaviour. If he beats or assaults the party a second time, the court will order the recognizance to be put in suit, and permit the party to recover the penalty; for the recognizance is never to be sued, but by leave of the court. But this proceeding very rarely or never happens. So, if any suitor of the court is arrested, either in the face of the court or out of the court, as he is going and coming to attend and follow his cause (for so far the court does and will protect every man), upon complaint made thereof, sitting the court, they will send out the tipstaff, and bring in the bailiffs and prisoner into court instantly, sitting the court, and they will order them forthwith to discharge him, or lay them by the heels; and the plaintiff in the action, upon complaint and oath made thereof, will certainly stand committed. He shall lie in prison till he petitions, submits, and begs pardon, and pays the costs to the other party" (b).

(b) Gilbert's *Forum Rom.* pp. 202, 203; *Clavering's Case*, 2 P. Will. 202, and *Stoell v. Botelar*, 2 Ch. 68, are instances of the actual granting of the writ, under circumstances like those stated by Gilbert in his *Forum Roman*, pp. 202, 203. It was usual to discharge persons committed for want of surety on articles of peace, and on a *supplicavit*, after a year, if nothing new happened, and the threat or danger did not continue. *Baynum v. Baynum*, Ambler, 63; *Ex parte Grosvenor*, 3 P. Will. 103. Similarly the court of King's Bench restricted the period during which the peace was to be observed according to the necessities of the case. *Rex v. Bowes*, 1 T. R. 696; *Dunn v. Reg.*, 12 Q. B. 1026.

CHAPTER XLI.

DISCOVERY, AND THE PRACTICE EMPLOYED TO PRESERVE AND
PERPETUATE EVIDENCE.

§ 1480. WE shall now proceed to the third and last head of Equity Jurisdiction proposed to be examined in these Commentaries, that is to say, the former auxiliary or assistant jurisdiction, which, indeed, was exclusive in its own nature, but, being applied in aid of the remedial justice of other courts, may well admit of a distinct consideration.

§ 1482. In former times remedial processes of bills of discovery and bills to take testimony *de bene esse*, pending a suit, were the subject-matter of independent proceedings, except in the case of equitable suits, but now form part of the remedial justice of all civil courts. The procedure is regulated by Rules of the Supreme Court, 1883, Order XXXI., which are founded on the Judicature Act, 1873, section 24 (7). The principles regulating the practice on bills of discovery still govern the court in the exercise of this jurisdiction (*a*), and it becomes necessary, therefore, to consider the former. An action for discovery only is still maintainable in a few cases of an exceptional nature (*b*). The Court of Chancery also entertained bills to perpetuate testimony, and an action may now be brought to perpetuate testimony at the suit of a person who will become entitled “upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event.” The procedure is regulated by Rules of the Supreme Court, 1883, Order XXXV., rules 35—38.

§ 1483. In the first place, as to bills of discovery. It has been already remarked that every bill in equity might properly have been deemed a bill of discovery, since it sought a disclosure from the defendant, on his oath, of the truth of the circumstances constituting

(*a*) See *Att.-Gen. v. Gaskill*, 20 Ch. D. 519; *Lyell v. Kennedy*, 8 App. Cas. 217; *Roberts v. Oppenheim*, 26 Ch. D. 724.

(*b*) *Orr v. Diaper*, 4 Ch. D. 92; *Norey v. Keep*, [1909] 1 Ch. 561; *Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 708. See *Burstall v. Beyfus*, 26 Ch. D. 35; *Kerr v. Rew*, 5 M. & Cr. 154.

the plaintiff's case as propounded in his bill. But that which was emphatically called in equity proceedings a bill of discovery, was a bill which asked no relief, but which simply sought the discovery of facts, resting in the knowledge of the defendant, or the discovery of deeds, or writings, or other things, in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or proceeding in another court. The sole object of such a bill, then, being a particular discovery, when that discovery was obtained by the answer, there could be no further proceedings thereon (*d*). To maintain a bill of discovery it was not necessary that the party should otherwise have been without any proof of his case; for he might maintain such a bill, either because he had no proof, or because he wanted it in aid of other proof (*e*). But, in general, it was necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary. Both under the old and the new practice, discovery in aid of proceedings out of the jurisdiction will be refused (*f*).

§ 1484. One of the defects in the administration of justice in the courts of common law arose from their want of power to compel a complete discovery of the material facts in controversy by the oaths of the parties in the suit (*g*). And hence (as we have seen), one of the most important and extensive sources of the jurisdiction of courts of equity was their power to compel the parties, upon proper proceedings, to make every such discovery.

§ 1485. Another defect of a similar nature was the want of a power in the courts of common law to compel the production of deeds, books, writings, and other things, which were in the custody or power of one of the parties, and were material to the right, title, or defence of the other (*h*). This defect also was remediable in courts of equity, which would compel the production of such books, deeds, writings, and other things.

§ 1486. The Roman law provided similar means, by the oath of the parties and by a bill of discovery, to obtain due proofs of the material facts in controversy between the parties. There seem originally to have been three modes adopted for this purpose. One was upon a due act of summons to require the party, without oath, to make a statement, or confession generally, relative to a matter in controversy. Another was to require him to answer before the proper judge to certain interrogatories, propounded in the form of distinct

(*d*) *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 71.

(*e*) *Finch v. Finch*, 2 Ves. Sen. 492; *Montague v. Dudman*, 2 Ves. Sen. 398.

(*f*) *Finch v. Angell*, 9 Sim. 180; *Reiner v. Marquis of Salisbury*, 2 Ch. D. 378; *Dreyfus v. Peruvian Guano Co.*, 41 Ch. D. 151.

(*g*) 3 Black. Comm. 381, 382.

(*h*) 2 Black. Comm. 382; Com. Dig. Chancery, 3 B. See *Att.-Gen. v. Gaskill*, 20 Ch. D. 519.

articles, which the judge might, in his discretion, order him to answer upon oath. The third was, to require the adverse party to answer upon oath, as to the fact in controversy; the party applying for the answer consenting to take the answer so given upon oath as truth. On this account it was called the decisive or decisory oath; and it admitted of no countervailing and contradictory evidence. In the two former cases other proofs were admissible (i). “Ubicunque judicem æquitas moverit, æque oportere fieri interrogationem, dubium non est (k). Voluit Prætor adstringere eum, qui convenitur, ex sua in judicio responsione, ut vel confitendo, vel mentiando, sese oneret” (l).

§ 1487. In the Roman law bills of discovery were called *Actiones ad exhibendum*, when they related to the production of things, or deeds, or documents, in which another person had an interest (m). When they required the answer of the party on oath to interrogatories, they were called *Actiones interrogatoriæ* (n). It seems that, originally, interrogatory actions might be propounded at any time before suit brought by any party having any interest. But we are informed in the Digest, that, in the time of Justinian, they had become obsolete, and interrogatories were propounded only in cases in litigation. “Interrogatoriis autem actionibus hodie non utimur, quia nemo cogitur ante judicium de suo jure aliquod respondere. Ideoque minus frequentantur, et in desuetudinem abierunt. Sed tantummodo, ad probationes litigatoribus sufficiunt ea, quæ ab adversa parte expressa fuerint apud judices, vel in hereditatibus, vel in aliis rebus, quæ in causis vertuntur” (o). The Roman law also required that the party seeking a discovery of facts should have a legal capacity to sustain himself in court; and that the discovery should respect some right of action (p). It does not seem important further to trace out the analogies of the Roman law on this subject; and, with these brief hints, showing the probable origin of the like proceedings in our courts of equity, we may return to the subject of bills of discovery.

§ 1488. As the object of this jurisdiction, in cases of bills of discovery, was to assist and promote the administration of public justice in other courts, they were greatly favoured in equity, and would be sustained in all cases where some well-founded objection did not exist against the exercise of the jurisdiction. We shall, therefore, proceed to the consideration of some of the circumstances which may constitute an objection to such bills, leaving the reader silently to draw the conclusion, that, if none of these, nor any of the like nature, intervene, the jurisdiction to compel the discovery sought would have

(i) 2 Domat, B. 1, tit. 6, § 5, pp. 458, 459; id. § 5, art. 4, 5.

(k) Dig. Lib. 11, tit. 1, f. 21.

(l) Ibid. f. 4.

(m) Pothier, Pand. Lib. 10, tit. 4, n. 1 to 7; id. n. 8 to 30.

(n) Ibid. Lib. 11, tit. 1, n. 1 to 24, and note (2).

(o) Ibid. Lib. 11, n. 24; Dig. Lib. 11, tit. 1, f. 1, § 1.

(p) Pothier, Pand. Lib. 11, tit. 1, n. 13, 15.

been strictly enforced by the Court of Chancery, and will now be strictly enforced in all the Divisions of the High Court of Justice.

§ 1489. The principal grounds upon which a bill of discovery might have been resisted, have been enumerated by a learned writer, as follows: (1) That the subject was not cognizable in any municipal court of justice. (2) That the court would not lend its aid to obtain a discovery for the particular court for which it was wanted. (3) That the plaintiff was not entitled to the discovery by reason of some personal disability. (4) That the plaintiff had no title to the character in which he sued. (5) That the value of the suit was beneath the dignity of the court. (6) That the plaintiff had no interest in the subject-matter, or title to the discovery required, or that an action would not lie for which it was wanted. (7) That the defendant was not answerable to the plaintiff, but that some other person had a right to call for the discovery. (8) That the policy of the law exempted the defendant from the discovery. (9) That the defendant was not bound to discover his own title. (10) That the discovery was not material in the suit. (11) That the defendant was a mere witness. (12) That the discovery called for would criminate the defendant. Some of these grounds of objection to discovery have ceased to be of force since the Judicature Acts, but some still operate, and it will be therefore proper to unfold the principles, with more particularity, by which a few of them are governed. Under the present practice it would seem that there are only four grounds on which discovery is refused when the discovery is sought in the proceedings in aid of which the discovery is required, viz., (a) that it is criminatory or penal, (b) that it is under the doctrine of legal professional privilege, (c) that it discloses the party's evidence, (d) that it is injurious to public interests (*q*).

§ 1489a. There is a point of practice which has an important bearing upon the question of discovery. If the discovery were sought in aid of proceedings in another court, or being a matter over which the Court of Chancery had jurisdiction, proceedings were in fact being maintained in another court, the right to discovery had to be judged on its own merits (*r*). In matters of equity jurisdiction, where the right to discovery was incidental to other relief, the right to discovery was entirely dependent upon the right to maintain the action for the principal relief (*s*). Actions limited to discovery can now only arise in exceptional cases, and the same principle would

(*q*) Objections (a) (d) are not applicable under the present practice except where an action (or bill, according to the old chancery practice) is brought for discovery in aid of some other proceeding which "now can be of rare occurrence": *per* His Honour Judge Bray, in a private communication to the late Mr. Grigsby. See Bray on Discovery, pp. 609 to 619.

(*r*) *Mills v. Campbell*, 2 Y. & C. Ex. 391.

(*s*) *Mellish v. Richardson*, 12 Price, 530.

apply (t). In the vast majority of instances the right to discovery will be incidental to other relief, and unless the party can show that the action is not maintainable, he will be precluded from raising many objections to discovery that were formerly available to him (u).

§ 1490. In the first place, it must clearly appear that the plaintiff has a title to the discovery which he seeks; or, in other words, that he has an interest in the subject-matter, to which the discovery is attached, capable and proper to be vindicated in some judicial tribunal. A mere stranger cannot seek for the discovery of the title of another person. Hence, an heir-at-law cannot, during the life of his ancestor, have a discovery of facts or deeds, material to the ancestor's estate; for he has no present title whatsoever, but only the possibility of a future title (x).

§ 1491. Even an heir-at-law has not a right to the inspection of deeds in the possession of a devisee; but an heir-in-tail is entitled to see the deeds creating the estate tail, but no further (y). On the other hand, a devisee is entitled against the heir-at-law to a discovery of deeds relating to the estate devised (z).

§ 1492. The reason of this distinction is fairly obvious. The title of an heir-at-law is a plain legal title, and a paramount title; for he succeeds to all fee simple lands of his ancestor that are not effectively devised to another (a). After the death of the ancestor different considerations prevail. Every freehold tenant in possession, even a tenant for life (b), where the interest is legal, is entitled to the title-deeds in right of his estate (c), and where the deeds relate to other lands in which he is not interested under a common title, to

(t) *Burstall v. Beyfus*, 26 Ch. D. 35.

(u) See *Ind Coope & Co. v. Emmerson*, 12 App. Cas. 300.

(x) *Buden v. Dore*, 2 Ves. Sen. 445. V.C. Wigram, in his treatise on the Law of Discovery, lays down the following as fundamental propositions on this subject. (1) It is the right, as a general rule, of the plaintiff in equity, to examine the defendant upon oath, as to all matters of fact, which, being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not, by his form of pleading, admit. (2) Courts of equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence; with this (if a) qualification, the right of a plaintiff in equity, to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case; and it does not extend to the discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence. Wigram, *Points in Law of Discovery*, pp. 21, 22; Story on Eq. Plead. § 572 to 574.

(y) *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 71. In this case Lord Rosslyn explained the ground of the doctrine in favour of the heir-in-tail; that it was removing an impediment which prevented the trial of a legal right. He afterwards added: "Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief; and where the person claims as heir of the body, it has been very properly stated, that it may show a title in another person, if the entail is not well barred."

(z) *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 71.

(a) *Shulldham v. Smith*, 6 Dow, 22; *Asten v. Asten*, [1894] 3 Ch. 260.

(b) *Leathes v. Leathes*, 5 Ch. D. 221.

(c) *Smith v. Chichester*, 2 Du. & War. 393.

have those deeds produced to evidence his title (*d*). These principles are further illustrated by the cases which decide that a tenant in remainder of a freehold interest may obtain production against the tenant for life (*e*), unless the estate in remainder is still contingent (*f*). Two matters must be distinguished. A party claiming an interest in an estate is entitled to a discovery of what documents are in the hands or under the control of another, and of all facts relevant to his own case, but he is not entitled to pry into the title of his adversary (*g*).

§ 1493. On the other hand, a devisee, claiming an estate under a will, cannot, without a discovery of the title-deeds, maintain any suit at law. The heir-at-law might not only defeat his suit, by withholding the means to trace out his legal title, but might also defend himself at law by setting up prior outstanding incumbrances. And thus he might prevent the devisee from having the power of trying the validity of the will at law (*h*).

§ 1494. In the next place, the courts of equity will not allow discovery to aid the promotion or defence of any suit which is not purely of a civil nature. Thus, for example, they will not compel a discovery pending to incriminate a party against whom it is sought (*i*), or in aid of a penal action (*k*); or of an action to enforce a forfeiture (*l*), for it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures. It has been held generally that Ord. 31, r. 1, of the Rules of the Supreme Court, 1883, was not intended to give the right to discovery in cases where, prior to the Judicature Acts, discovery was not obtainable (*m*).

§ 1496. In the next place, no discovery will be compelled, where it is against the policy of the law from the particular relation of the parties. Thus, for instance, a person standing in the relation of professional confidence to another, as his counsel or attorney, will not be compelled to disclose the secrets of his client, unless the privilege is waived by the client (*n*). It is strictly confined to legal advisers, whatever their nationality may be (*o*). But as was pointed

(*d*) *Ruscoe v. Richards*, 1 Jur. 304.

(*e*) *Davis v. Earl of Dysart*, 20 Beav. 405.

(*f*) *Noel v. Ward*, 1 Mad. 322.

(*g*) *Lyell v. Kennedy*, 8 App. Cas. 217. This case will give a clue to the earlier cases.

(*h*) *Duchess of Newcastle v. Lord Pelham*, 3 Bro. P. C. 460.

(*i*) *Cartwright v. Green*, 8 Ves. 405; *Redfern v. Redfern*, [1891] P. 139.

(*k*) *Hunnings v. Williamson*, 10 Q. B. D. 459.

(*l*) *Earl of Mexborough v. Whitwood Urban Council*, [1897] 2 Q. B. 111.

(*m*) *Hunnings v. Williamson*, 10 Q. B. D. 459; *Lyell v. Kennedy*, 8 App. Cas. 217.

(*n*) *Parkhurst v. Lowten*, 2 Swanst. 194, and the cases in notes; *Wentworth v. Lloyd*, 10 H. L. C. 589.

(*o*) *Bunbury v. Bunbury*, 2 Beav. 173; *Lawrence v. Campbell*, 4 Drew. 485; *Wheeler v. Le Marchant*, 17 Ch. D. 675.

out by Sir George Jessel, M.R. (*p*): "The protection is of a very limited character, and is restricted, in this country, to obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the case of communication to the legal advisers are protected from production or discovery in order that the legal advice may be obtained safely and effectually." Accordingly a solicitor must depose to a fact not confidentially communicated to him as the execution of a deed, or matters which come to his knowledge independently of his character as solicitor to a party in a particular matter (*q*). Fraud or criminal conduct displaces the privilege, "for the rule does not apply to all that passes between a client and his solicitor, but only to what passes between them in professional confidence; and no court can permit it to be said that the contriving of a fraud, can form part of the professional occupation of an attorney or solicitor" (*r*). The privilege extends to persons necessarily employed by the solicitor to form a just conclusion (*s*), as an interpreter to render communication between the client and his solicitor possible (*t*). But it does not extend to any other category of agent immediately consulted as a pursuivant of the Herald's College (*u*), or a patent agent (*x*), or any other persons in a confidential relationship, as for instance, a medical man or clergyman (*y*).

§ 1497. In the next place, no discovery will be compelled, except of facts material to the case stated by the plaintiff (*z*); for otherwise, he might insist upon a knowledge of facts wholly impertinent to his case, and thus compel disclosures in which he had no interest, to gratify his malice, or his curiosity, or his spirit of oppression. But cases of immateriality may be put far short of such unworthy objects. Thus, if a mortgagor should seek to ascertain whether the mortgagee was a trustee or not, that would, ordinarily, be deemed an improper inquiry, since, unless special circumstances were shown, it could not be material to the plaintiff, whether any trust were reposed in the mortgagee or not (*a*). And documents are material to the case if it is

(*p*) *Wheeler v. Le Marchant*, 17 Ch. D. 675.

(*q*) *Sanford v. Remington*, 2 Ves. Jun. 189; *Colmon v. Orton*, 9 L. J. Ch. 268; *Dwyer v. Collins*, 7 Ex. 639; *In re Arnott*, 37 W. R. 223.

(*r*) Lord Cranworth, V.C., *Follet v. Jefferys*, 1 Sim. N. S. 1, 17; *Reg. v. Cox*, 14 Q. B. D. 153; *Williams v. Quebrada Railway, Land and Copper Co.*, [1895] 2 Ch. 751.

(*s*) *Wheeler v. Le Marchant*, 17 Ch. D. 675; *Learoyd v. Halifax Banking Co.*, [1893] 1 Ch. 686.

(*t*) *Du Barre v. Livette*, 1 Peake, 108. The actual ruling is inconsistent with *Reg. v. Cox*, 14 Q. B. D. 153.

(*u*) *Slade v. Tucker*, 14 Ch. D. 827.

(*x*) *Moseley v. Victoria Co.*, 55 L. T. 482.

(*y*) *Russell v. Jackson*, 9 Hare, 392.

(*z*) See *Finch v. Finch*, 2 Ves. Sen. 492.

(*a*) *Montague v. Dudman*, 2 Ves. Sen. 399.

not unreasonable to suppose that they may contain information directly or indirectly enabling the party seeking discovery either to advance his own case, or to damage the case of his adversary (b).

§ 1498. Formerly arbitrators were not compellable to disclose the grounds on which they made their award; nor could they be impleaded unless they were charged with corruption, fraud, or partiality (c). There is now power to compel an arbitrator to state a case for the opinion of the court upon a question of law (d). On a question of fact the decision of the arbitrator is conclusive.

§ 1499. In the next place, it is ordinarily a good objection to a discovery, that it seeks the discovery from a defendant who is a mere witness, and has no interest in the suit; for, as he may be examined in the suit as a witness, there is no ground to make him a party to discovery, since his answer would not be evidence against any other person in the suit (e).

§ 1501. Formerly officers of a corporation, or other members of the corporation, could be made parties to assist discovery against the corporation. Under the present practice an order to answer interrogatories is made upon any member or officer of the corporation (f), in the case of ordinary disclosure and production of documents. The order is made upon an officer of the corporation, and it is improper to make the officer a party for that purpose (g).

§ 1502. In the next place, a defendant might have objected to a discovery, that he was a *bonâ fide* purchaser of the property for a valuable consideration, without notice of the plaintiff's claim. To entitle himself to this protection, however, the purchase must not only be *bonâ fide*, and without notice, and for a valuable consideration, but the purchaser must have paid the purchase-money (h). This exception has now become unimportant, as discovery is an incident to all actions in the High Court (i).

§ 1504. Upon the same principle, a jointress is entitled to protect herself against the discovery of her jointure deed, if the party seeking the discovery is not capable of confirming the jointure, or if, being capable, he does not offer by his bill to confirm it, when the discovery will be granted, as soon as the confirmation is made, but not before.

(b) *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.*, 11 Q. B. D. 55.

(c) *Ives v. Metcalfe*, 1 Atk. 63; *Tittenson v. Peat*, 3 Atk. 529; *Anon.*, 3 Atk. 644.

(d) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19.

(e) *Fenton v. Hughes*, 7 Ves. 287; *Burstall v. Beyfus*, 26 Ch. D. 35.

(f) Rules of the Supreme Court, 1883, Order XXXI., rule 5; *Southwark Water Co. v. Quick*, 3 Q. B. D. 315; *Welsbach Incandescent Gaslight Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1.

(g) *Wilson v. Church*, 9 Ch. D. 552.

(h) Butler's note to Co. Litt. 290 b, note (1), § 13; *Willoughby v. Willoughby*, 1 T. R. 763; *Jackson v. Rowe*, 4 Russ. 514; 9 L. J. O. S. Ch. 32.

(i) *Ind Coope & Co. v. Emmerson*, 12 App. Cas. 300.

For otherwise, it might happen, that, after the discovery, his offer might become ineffectual by the intervention of other interests (*k*).

§ 1504*a*. It was for a long time considered to be the rule that a plaintiff in ejectment at law was not entitled to bring a bill in equity for discovery, on the maxim that a plaintiff in ejectment must succeed by the strength of his own title and not by the weakness of his adversary. But in the late case of *Lyell v. Kennedy* (*l*), it was decided by the House of Lords, overruling the unanimous judgment of the Court of Appeal, that the ordinary rule as to discovery applies as much to an action for the recovery of land as to all other actions—*i.e.*, that a plaintiff is entitled to discovery as to all matters relevant to his own, and not to the defendant's case. It should be remarked that the decision did not proceed on the principle that the right of discovery under the present rules of the Supreme Court, is more extensive than it was in the Court of Chancery, but on the authority of decided cases, which were not quoted in the Court of Appeal, and also that of the leading writers on the Law of Discovery (*m*). At the same time the House recognized the validity of the rule that a defendant in possession of land cannot be required to disclose his title, but only the nature of his title (*n*); *e.g.*, whether he claims as heir, or devisee, or a disseisor in whose favour the statute of limitations has run.

§ 1505. Let us now pass to the consideration of the methods to preserve and perpetuate testimony when it is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation (*o*). Before the Judicature Act this was done by means of a bill brought in the Court of Chancery, and the following sections give the old practice. Bills of this sort are obviously indispensable for the purposes of public justice, as it may be utterly impossible for a party to bring his rights presently to a judicial decision; and unless, in the intermediate time, he may perpetuate the proofs of those rights, they may be lost without any default on his side. The civil law adopted similar means of preserving testimony which was in danger of being lost (*p*).

§ 1506. This sort of bill (as has been remarked by Mr. Justice Blackstone) “is most frequent, when lands are devised by will, away from the heir-at-law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery

(*k*) *Leech v. Trollop*, 2 Ves. Sen. 662.

(*l*) 8 App. Cas. 217.

(*m*) Hare on Discovery, p. 198; Sir James Wigram on Discovery, 2nd edit., pp. 14 and 122.

(*n*) *Bellwood v. Wetherell*, 1 Y. & C. Ex. 211; *Horton v. Bott*, 2 H. & N. 249.

(*o*) *Ellice v. Roupell*, 32 Beav. 308, and note. Such procedure is now styled an action in the nature of a bill to perpetuate testimony.

(*p*) Domat, B. 3, tit. 6, § 3; Dig. Lib. 9, tit. 2, f. 40; Gilb. For. Roman, ch. 7, pp. 118, 119; *Mason v. Goudburne*, Rep. t. Finch, 391.

against the heir, and sets forth the will *verbatim* therein, suggesting, that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue, as in other cases, and examine the witnesses to the will; after which the cause is at an end without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery" (q). This practice is substantially embodied in the rules of the Supreme Court, 1883, Order XXXVII., rules 35 to 38.

§ 1507. The jurisdiction, which courts of equity exercise to perpetuate testimony, has been thought to be open to great objections, although it seems indispensable for the purposes of public justice. First: it leads to a trial on written depositions, which is deemed to be much less favourable to the cause of truth than the *vivâ voce* examination of witnesses. But, what is still more important, inasmuch as those depositions can never be used until after the death of the witnesses, and are not, indeed, published until after their death, it follows, that, whatever may have been the perjury committed in those depositions, it must necessarily go unpunished. The testimony, therefore, has this infirmity, that it is not given under the sanction of those penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that courts of equity do not generally entertain bills to perpetuate testimony, for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice.

§ 1508. If, therefore, it be possible, that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony, courts of equity will not entertain any bill for the purpose. For the party, under such circumstances, has it fully in his power to terminate the controversy by commencing the proper action; and, therefore, there is no reasonable ground to give the advantage of deferring his proceedings to a future time, and to substitute thereby written depositions for *vivâ voce* evidence. But, on the other hand, if the party who files the bill can by no means bring the matter in controversy into immediate judicial investigation, which may happen when his title is in remainder, or when he himself is in actual possession of the property, or when he is in the present possession of the rights which he seeks to perpetuate by proofs; in every such case, courts of equity will entertain a suit to secure such proofs. For, otherwise, the only evidence which could support his title, possession, or rights might be lost by the death of his witnesses; and the adverse party might purposely delay any suit to vindicate his claims with a view to that

very event (r). And the enlarged jurisdiction of the court to determine questions which may arise in the future has restricted the exercise of this jurisdiction (s). If proceedings are actually pending the remedy of a party is for a commission to take evidence *de bene esse* in the action, and not independent proceedings to perpetuate testimony (t).

§ 1509. As to the right to maintain a bill to perpetuate testimony, there is no distinction whether it respects a title or claim to real estate, or to personal estate, or to mere personal demands; or whether it is to be used as matter of proof in support of the plaintiff's action, or as matter of defence to repel it (u). But there is this difference between a bill of discovery and a bill to perpetuate testimony, that the latter may be brought in many cases where the former cannot be. Thus, in cases which involve a penalty or forfeiture of a public nature, a bill of discovery will not lie at all. And, in cases which involve only a penalty or forfeiture of a private nature, it will not lie, unless the party entitled to the benefit of the penalty or forfeiture waives it (x). But no such objection exists in regard to a bill to perpetuate testimony; for the latter will lie, not only in cases of a private penalty or forfeiture, without waiving it where it may be waived, as in cases of waste, or of the forfeiture of a lease, but also in cases of public penalties, such as for the forgery of a deed, or for a fraudulent loss at sea (y). There was formerly no jurisdiction to entertain a bill to perpetuate testimony where a title of honour was in question. This was remedied by statute 5 & 6 Vict. c. 69, and the statutory provisions are now embodied in rule 35 of Order XXXVII.

§ 1510. There is also, perhaps, another difference between the case of a bill of discovery, and that of a bill to perpetuate testimony, in regard to a *bonâ fide* purchaser for a valuable consideration without notice. We have seen that the former bill is not maintainable against him (z). But as the latter asks for no discovery, and only seeks to perpetuate testimony, which might be used at the time, if the circumstances called for it, and an action were brought, it does not seem open to the same objection. And there is this reason for the distinction, that otherwise the plaintiff might lose his legal rights by the mere defect of testimony, which, if he could maintain a suit, he would clearly be entitled to (a).

(r) *Angell v. Angell*, 1 Sim. & Stu. 83, and cases noted.

(s) *West v. Lord Sackville*, [1903] 2 Ch. 378.

(t) *Earl Spencer v. Peek*, L. R. 3 Eq. 415.

(u) Order XXXVII., rule 35; *Earl of Suffolk v. Green*, 1 Atk. 450.

(x) *Ante*, § § 1319, 1320, 1494.

(y) *Earl of Suffolk v. Green*, 1 Atk. 450; *Brooking v. Maudslay, Sons & Field*, 88 Ch. D. 636.

(z) *Ante*, § 1502.

(a) *Dursley v. Fitzhardinge*, 6 Ves. 263, 264; *ante*, § 1508, and note; *Ross v. Close*, 5 Bro. Parl. Cas. 562.

§ 1511. It follows, from the very nature and objects of such bills, that the plaintiff, who is desirous of perpetuating evidence, must, by his bill, show that he has some interest in the subject-matter, and that it may be endangered if the testimony in support of it be lost (*b*). Courts of equity will not, however, perpetuate testimony in support of the right of a plaintiff, which may be immediately barred by the defendant (*c*). But if the interest be a present vested one, not liable to such an objection, it is perfectly immaterial how minute that interest may be; or how distant the possibility of its coming into actual possession and enjoyment may be. A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is, nevertheless, a present estate, although with reference to chances, it may be worth little or nothing (*d*). On the other hand, although the contingency may be ever so proximate and valuable, yet if the party has not, by virtue of that, an estate (as in the case of the due execution of a will of a lunatic), courts of equity will not interfere to perpetuate evidence touching it (*e*).

§ 1512. If the bill is sustained, and the testimony is taken, the suit terminates with the examination; and, of course, is not brought to a hearing (*f*). But the decretal order of the court granting the commission directs that the depositions, when taken, shall remain to perpetuate the memory thereof, and to be used, in case of the death of the witnesses, or their inability to travel, as there shall be occasion (*g*).

§ 1513. There was, until the Judicature Act, 1873, another species of bills having a close analogy to that to perpetuate testimony, and often confounded with it; but which, in reality, stood upon distinct considerations. We allude to bills to take testimony *de bene esse*, and bills to take the testimony of persons resident abroad, to be used in suits actually pending in the country where the bills were filed (*h*). There was this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter were, and could be, brought only by persons who were in possession, under their title, and who could sue at law, and thereby had an opportunity to examine their witnesses in such suit. But bills to take testimony *de bene esse* might be brought, not only by persons in possession, but by persons who were out of possession, in aid of the trial at law (*i*). There was

(*b*) *Mason v. Goodburne*, Rep. t. Finch, 391; *Dursley v. Fitzhardinge*, 6 Ves. 261, 262; *Earl of Belfast v. Chichester*, 2 Jac. & Walk. 449, 451.

(*c*) *Dursley v. Fitzhardinge*, 6 Ves. 260 to 262; *Earl of Belfast v. Chichester*, 2 Jac. & Walk. 451, 452.

(*d*) *Allan v. Allan*, 15 Ves. 136; *Earl of Belfast v. Chichester*, 2 Jac. & Walk. 451, 452.

(*e*) *Sackvill v. Ayleworth*, 1 Vern. 105.

(*f*) *Ellice v. Roupell*, 32 Beav. 308; Order XXXVII. r. 38.

(*g*) *Mason v. Goodburne*, Rep. t. Finch, 391, 392.

(*h*) 3 Black. Comm. 438; Gilb. For. Roman. 140.

(*i*) 1 Mad. Prac. Ch. 153.

also another distinction between them, which was, that bills *de bene esse* could be brought only when an action was then depending and not before (*k*).

§ 1514. Courts of common law might adjourn a case upon the ground that a material witness was absent, or his evidence not immediately available. The order was granted more reluctantly in the case of a plaintiff than of a defendant, for the plaintiff might withdraw the record or submit to a nonsuit (*l*), a privilege not now available to him in the Supreme Court (*m*). But they had no authority to issue commissions to take the testimony of witnesses *de bene esse* in any case (*n*). But courts of equity were constantly in the habit of exercising such jurisdiction in aid of trials at law, where the subject-matter admitted of present judicial investigation, and a suit was actually pending in some court (*o*). They would, for example, upon a proper bill, grant a commission to examine witnesses, who were abroad, and who were material witnesses to the merits of the cause, whether the adverse party consented thereto or not (*p*). They would also entertain a bill to preserve the testimony of aged and infirm witnesses, resident at home, and of witnesses about to depart from the country, to be used in a trial at law, in a suit then pending, if they were likely to die before the time of trial might have arrived (*q*). They would even entertain such a bill to preserve the testimony of a witness, who was neither aged nor infirm, if he were a single witness to a material fact in the cause (*r*). This latter case stood upon the same general ground as the other; that is to say, the extreme danger to the party of an irreparable loss of all the evidence, on which he might have relied in support of his right in the trial at law; for that, which depends upon a single life, must be practically treated as being very uncertain in its duration (*s*). In one case a commission issued to examine two material witnesses (*t*). But it does not appear from the meagre report whether they deposed to distinct facts (*u*).

§ 1514a. The present practice as to taking evidence *de bene esse* is regulated by Orders of the Supreme Court, 1883. Order 37, r. 5, provides that, "The court or a judge may in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or a judge or

(*k*) *Angell v. Angell*, 1 Sim. & S. 83; *Ellice v. Roupell*, 32 Beav. 308.

(*l*) *Turquand v. Dawson*, 1 Cr. M. & R. 709; *Turner v. Merryweather*, 7 C. B. 251.

(*m*) *Fox v. Star Newspaper Co.*, [1900] A. C. 19.

(*n*) 3 Black. Comm. 383; *Macaulay v. Shackell*, 1 Bligh N. S. 96.

(*o*) *Macaulay v. Shackell*, 1 Bligh N. S. 96.

(*p*) *Moodalay v. Morton*, 1 Bro. C. C. 469; *Macaulay v. Shackell*, 1 Bligh N. S. 96; *Bellamy v. Jones*, 8 Ves. 31.

(*q*) If a witness is seventy years old, he is deemed aged within the rule. *Fitzhugh v. Lee*, Ambler, 65; *Rowe v. —*, 13 Ves. 261, 262; *Prichard v. Gee*, 5 Mad. 364.

(*r*) *Hankin v. Middleditch*, 2 Bro. C. C. 641, and Mr. Belt's note.

(*s*) *Shirley v. Earl Ferrers*, 3 P. Will. 77.

(*t*) *Cholmondeley v. Oxford*, 4 Bro. C. C. 157. (*u*) *Bidder v. Bridges*, 26 Ch. D. 1.

any officer of the court, or any other person, and at any place of any witness or person, and may empower any party to such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct." Under this rule, if the court is satisfied either when the application is made, or upon an application to discharge an order granted *ex parte* for the examination of witnesses *de bene esse*, that it is not necessary for the purposes of justice either altogether or to the extent to which it goes, then the court ought not to grant it in the one case, and ought not to maintain it any further than is necessary in the other. And although the fact that a witness is seventy years of age is *prima facie* a good ground for an order to examine him *de bene esse*, yet if there are a great number of witnesses to the same fact, especially if they are witnesses as to custom, reputation, or the like, this is not a sufficient reason, why they should be examined under an order *de bene esse* (x).

§ 1515. In regard to commissions to take the testimony of witnesses abroad, although they are grantable in civil actions only; yet they are not confined to cases purely *ex contractu*, or touching rights of property; but they are grantable in cases of actions for civil torts, although such torts may also be indictable. Thus, for example, a commission will be granted to take the testimony of witnesses abroad, in order to establish a justification in a civil action for a libel, although the justification involves a criminal charge against the plaintiff, and the libel may be the subject of an indictment (y).

§ 1516. Some confusion exists in the authorities as to the publication of the testimony in the three distinct classes of cases before mentioned: first, on examination of witnesses *de bene esse*, pending a cause; secondly, on examinations of witnesses in a bill, merely to prove a will, *per testes*, as it is called, that is, by the subscribing witnesses; and thirdly, on examinations of witnesses on common bills to perpetuate testimony; as, for example, to perpetuate the testimony respecting a will, or a deed. Owing to a change in the practice only the third has become of importance (z). Publication is not ordinarily allowed, during the lifetime of the witnesses, because of the dangers incident thereto, there being no limits as to the points to which the witnesses are examined; but the publication is a matter resting in the sound discretion of the court, upon the special circumstances of the case; and it will be allowed or refused accordingly (a). In this last class of cases (of bills to perpetuate testimony), when the examinations are taken, the case is considered to be at an end; or at least as suspended, until the anticipated action is brought; and then, at a

(x) See the judgment of the Earl of Selborne, L.C., in *Bidder v. Bridges*, 26 Ch. D. 1.

(y) *Macaulay v. Shackell*, 1 Bligh N. S. 96.

(z) See *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241.

(a) *Harris v. Cotterell*, 3 Mer. 678; *Barnsdale v. Lowe*, 2 Russ. & M. 142.

suitable period, an order for the publication thereof may be obtained from the court upon a proper case made, such as the death or absence of the witnesses, or their inability to attend the trial (b).

§ 1516a. In a late case (c) it was held that evidence taken *de bene esse* in a former suit was admissible on behalf of the plaintiffs in a latter suit, since the issue in the two suits was the same, and there was privity of estate between the parties in the two suits respectively.

§ 1532. Here (d) these Commentaries are regularly brought to their close according to their original design. Let not, however, the ingenuous youth imagine that he also may here close his own preparatory studies of Equity Jurisprudence, or content himself for the ordinary purposes of practice with the general survey which has thus been presented to his view. What has been here offered to his attention is designed only to open the paths for his future inquiries; to stimulate his diligence to wider and deeper and more comprehensive examinations; to awaken his ambition to the pursuit of the loftiest objects of his profession; and to impress him with a profound sense of the ample instruction and glorious rewards which await his future enterprise and patient devotion in the study of the first of human sciences—the Law. He has as yet been conducted only to the vestibule of the magnificent temple reared by the genius and labours of many successive ages to Equity Jurisprudence. He has seen the outlines and the proportions, the substructions and the elevations, of this wonderful edifice. He has glanced at some of its most prominent parts, and observed the solid materials of which it is composed, as well as the exquisite skill with which it is fashioned and finished. He has been admitted to a hasty examination of its interior compartments and secret recesses. But the minute details, the subtle contrivances, and the various arrangements which are adapted to the general exigencies and conveniences of a polished society, remain to invite his curiosity and gratify his love of refined justice. The grandeur of the entire plan cannot be fully comprehended but by the persevering researches of many years. The masterpieces of ancient and modern art still continue to be the study and admiration of all those who aspire to a kindred excellence; and new and beautiful lights are perpetually reflected from them which have been unseen or unfelt before. Let the youthful jurist who seeks to enlighten his own age or to instruct posterity, be admonished that it is by the same means alone that he can hope to reach the same end. Let it be his encouragement and

(b) *Morrison v. Arnold*, 19 Ves. 671; *Earl of Abergavenny v. Powell*, 1 Mer. 433; *Teale v. Teale*, 1 Sim. & S. 385.

(c) *Llanover v. Homfray*; *Phillips v. Llanover*, 19 Ch. D. 224. See *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241.

(d) § § 1517 to 1531 dealt with the subject of Peculiar References in Equity; these have now no existence, and the sections are therefore omitted.

consolation that by the same means the same end can be reached. It is but for him to give his days and nights with a sincere and constant vigour to the labours of the great masters of his own profession, and although he may now be but a humble worshipper at the entrance of the porch, he may hereafter entitle himself to a high place in the ministrations at the altars of the sanctuary of justice.

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